217-5 79
127-5 79

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1887.**

No. 224.

TALMADGE E. BROWN, APPELLANT,

*vs.*

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

**FILED MAY 4, 1885.**

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1887.

No. 224.

TALMADGE E. BROWN, APPELLANT,

*vs.*

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.


| | Original. | Print. |
|---|---|---|
| Petition | 1 | 1 |
| Exhibit No. 1—Acceptance of proposal | 15 | 9 |
| No. 2—Form of certificate of auditor | 16 | 10 |
| No. 3—Assignment, June 20, 1874 | 16 | 10 |
| Traverse | 17 | 10 |
| Plea | 18 | 11 |
| Replication | 19 | 11 |
| Finding of facts | 22 | 13 |
| Opinion | 31 | 25 |
| Judgment | 37 | 31 |
| Motion for appeal and order thereon | 38 | 31 |
| Clerk's certificate | 39 | 32 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 13, 1888.

1 *Petition. Filed November* 16, 1880. *J. R.*

In the United States Court of Claims. December Term, 1880.

TALMADGE E. BROWN, Claimant,
*vs.*
THE DISTRICT OF COLUMBIA, Defendant. } No. 145.

To the honorable the judges of the United States Court of Claims:

*First Count.*

Your petitioner, Talmadge E. Brown, a citizen of the United States and a resident of the city of Des Moines, State of Iowa, respectfully shows to the Court—

That from 1869 to 1874, inclusive, your petitioner, Talmadge E. Brown, was associated in business with William W. Ballard and Edward L. Marsh, who were then and still are citizens of the
2 United States; that said three persons were partners in business under the firm name and style of the Ballard Pavement Company, and were engaged in the business of grading, paving, etc., streets, sidewalks, etc.

That on or about December 10, 1872, the said Ballard Pavement Company, a partnership composed as aforesaid, made and completed a contract with the said District of Columbia whereby the said Ballard Pavement Company became bound to pave with wood pavement such streets or parts of streets in the cities of Washington and Georgetown, in the said District of Columbia, as the board of public works of the said District of Columbia should designate from time to time, to the amount of seventy-five thousand square yards, said work to be assigned and completed during 1873, and at the price of three dollars and fifty cents per square yard, and also to do such grading, hauling, filling, and setting of curbing on the streets paved by said Ballard Pavement Company, and at the board prices, as the said board of public works should order or direct; that by the terms of said contract the said work was to be paid for as the same progressed; that the said board of public works of the said District of Columbia made and entered into said contract with the said Ballard Pavement Company, and at the time the same was made the said board of public works had full power and authority to make the same in the manner and form the same was made. Your petitioner annexes hereto a true copy of said contract, marked Exhibit "No. 1," and makes the same a part of this petition and pleading.

Your petitioner further states that after said contract was made and entered into as aforesaid the said board of public works, in pursuance of said contract and in part execution and performance thereof, did, on, to wit, the — day of ——, 1873, designate a part of Seventh street N. W. as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed and pave the same and to do certain grading,

etc., in connection therewith; that the said Ballard Pave-
3 ment Company did proceed at once to the doing of said work and completed the same as soon as practicable; that the said work so done on said Seventh street aggregated about —— square yards, and the grading, etc., amounted to about $——.

That afterward and on, to wit, the — day of ——, 1873, the said board of public works, in pursuance of said contract and in further execution and performance thereof, did designate parts of Fifth street S. E. as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed and pave the same and to do certain grading, etc., in connection therewith; that the said Ballard Pavement Company did proceed forthwith to the doing of said work and completed the same as soon as practicable; that the said work so done on said Fifth street aggregated about —— square yards, and the grading, etc., amounted to about $——.

That afterward and on, to wit, the — day of ——, 1873, the said board of public works, in pursuance of said contract and in further execution and performance thereof, did designate parts of B street S. E. as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed and pave the same pursuant to said contract and to do certain grading, etc., in connection therewith; that the said Ballard Pavement Company did proceed promptly to the doing of said work according to said contract and completed the same as soon as practicable; that the said work so done on said B street aggregated about —— square yards, and the grading, etc., amounted to about $——.

That afterwards and on, to wit, the — day of ——, 1873, the said board of public works, in pursuance of said contract and in further execution and performance thereof, did designate parts of Sixth street N. W. as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed and pave the same and to do certain grading, etc., in
4 connection therewith; that the said Ballard Pavement Company did proceed immediately to the execution of said work and completed the same with all reasonable despatch; that the said work done on said Sixth street N. W. aggregated about —— square yards, and the grading, etc., amounted to about $——.

That afterward and on, to wit, the — day of ——, 1873, the said board of public works, in pursuance of said contract and in further execution and performance thereof, did designate parts of Corcoran street as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed to pave the same and to do certain grading, etc., in connection therewith; that the said Ballard Pavement Company did proceed at once to the doing of said work and completed the same as soon as practicable; that the said work so done on said Corcoran street aggregated about —— square yards, and the grading, etc., amounted to about $——.

That afterward and on, to wit, the — day of ——, 1873, the said board of public works, in pursuance of said contract and in the

further execution and performance thereof, did designate parts of Bridge street, Georgetown, as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed to the paving of the same and to do certain grading, etc., in connection therewith; that the said Ballard Pavement Company did proceed directly to the execution of said work and completed the same as soon as was practicable; that the said work so done on said Bridge street aggregated about —— square yards, and the grading, etc., amounted to about $——.

That afterward and on, to wit, the — day of ——, 1873, the said board of public works, in pursuance of said contract and in the further execution and performance thereof, did designate parts of Potomac street, Georgetown, as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed and pave the same and to do certain
5 grading, etc., in connection therewith; that the said Ballard Pavement Company did proceed promptly to the doing of said paving, grading, etc., and completed the same as soon as practicable; that the said paving so done on said Potomac street aggregated about —— square yards, and the grading, etc., amounted to about $——.

That afterward and on, to wit, the — day of ——, 1873, the said board of public works, in pursuance of said contract and in further execution and performance thereof, did designate parts of Washington street, Georgetown, as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed and pave the same and to do certain grading, etc., in connection therewith; that the said Ballard Pavement Company did proceed at once to the doing of said work and completed the same as soon as practicable; that the said work so done on the said Washington street aggregated about —— square yards and the grading, etc., amounted to about $——.

That afterward and on, to wit, the — day of ——, 1873, the said board of public works, in pursuance of said contract and in further execution and performance of the same, did designate parts of Congress street, Georgetown, as one of the streets to be paved by the said Ballard Pavement Company under said contract, and ordered said company to proceed and pave the same and to do certain grading, etc., in connection therewith; that the said Ballard Pavement Company did proceed immediately to the doing of said work and completed the same as soon as practicable; that the said paving so done on said Congress street aggregated about —— square yards, and the grading, etc., amounted to about $——; and your petitioner further avers that the said board of public works duly approved the paving, grading, etc., so done by the said Ballard Pavement Company and duly and fully accepted the same under said contract; and the said
board of public works, as evidence of their approval and ac-
6 ceptance of said paving, grading, etc., caused to be issued and delivered to said Ballard Pavement Company auditor's certificates therefor, substantially in the form of Exhibit "No. 2," annexed hereto and made part hereof, for the several amounts due the

said Ballard Pavement Company for the work aforesaid, aggregating in all the sum of $139,569.85.

That the said several designations of streets, the supplemental contracts, bonds, and all the vouchers, measurements, receipts, etc., are in the custody of the Commissioners of the District of Columbia, who refuse access to the same, and for this reason your petitioner cannot state more specifically and definitely than he has herein the several dates, amounts, designations, orders, parts of streets, grading, curbing, measurements, etc.; and your petitioner avers, upon his information and belief, that the said Commissioners of the District of Columbia have in their possession or under their control all the papers by and from which all said matters will fully and specifically appear, and your petitioner asks that they be required to deposit the same with this Court.

Your petitioner further avers that the aggregate of all the paving done by the said Ballard Pavement Company under said contract and pursuant to the designations of parts of streets and under the orders of said board of public works as aforesaid is about thirty-five thousand square yards; that the said board of public works, although often requested, failed and refused to designate any other streets or parts of streets to be paved by the said Ballard Pavement Company, thereby leaving upon said contract about forty thousand square yards of paving unexecuted; that the board did not stop the work because of any violation of the contract on the part of the contractors.

Your petitioner further avers that the said Ballard Pavement Company at a very great expense made provision for and by
7 contract had purchased the lumber necessary to fulfill said paving contract for seventy-five thousand square yards so made as aforesaid with the board of public works for the defendant, and also at other and further great expense had provided the necessary machinery, tools, teams, and workmen to do and fully perform said contract; that repeatedly and frequently, time and time again, during the months of May, June, July, August, September, October, November, and December, 1873, the said Ballard Pavement Company notified the said board of public works that said company was ready to commence and complete the entire work and any and all parts of it as contemplated by said contract and demanded of said board that it designate the streets whereon said work should be done; but said board, although it promised from time to time that it would so designate the streets and thereby kept said Ballard Pavement Company in waiting therefor with its materials, men, teams, etc., yet it utterly and entirely neglected and refused so to do, whereby and by reason of all said matters the said Ballard Pavement Company was damaged in the sum of one hundred thousand dollars.

Your petitioner further states that the said contract of date December 10, 1872, upon which this action is based, has been, in effect, ratified and confirmed and the right of action thereon recognized and approved by virtue of several acts and resolutions of Congress, and among them the act of June 20, 1874, resolution of December 21, 1874, act of March 3, 1875, joint resolution of March 14, 1876, act

of June 11, 1878, and the act of June 16, 1880; and your petitioner further states that the claims herein made were never rejected by the board of audit.

Your petitioner further states that on the 20th day of June, 1874, W. W. Ballard and E. L. Marsh, two of the members of said firm of the Ballard Pavement Company, for a full and valuable consideration sold and assigned in writing all and singular their re-
8 spective rights, interests, and claims in and to the cause of action herein set forth, a copy of which said assignment is annexed hereto as part thereof, marked Exhibit "No. 3," whereby the plaintiff, Talmadge E. Brown, became the sole owner of said claim and cause of action, and he is now the owner thereof, and has made no assignment or transfer of the same or any part thereof to any one, but stills owns and holds the whole thereof in his own right.

*Second Count.*

And your petitioner further states that the said The District of Columbia entered into a contract with the Ballard Pavement Company, a copy of which is annexed to the first count hereof, marked Exhibit "No. 1," and which has been ratified by the acts and resolutions of Congress, as stated in the first count hereof, and, pursuant to said contract and in part execution thereof, did, by its board of public works, during the year 1873, designate parts of the following streets to be paved by the said Ballard Pavement Company under and pursuant to said contract, to wit: Seventh street N. W.; Fifth street S. E.; B street S. E.; Sixth street N. W.; Corcoran street; Bridge street, Georgetown; Potomac street, Georgetown; Washington street, Georgetown, and Congress street, Georgetown; that the said Ballard Pavement Company did proceed to lay the pavement and do the grading as designated by said board of public works under said contract, which work was approved and accepted by the said board of public works.

Your petitioner further states that the designation of the parts of said streets to be paved, the amount of work done, the measurements, receipts, and all papers connected therewith are in the custody of the Commissioners of the District of Columbia, who refuse access to the same, and for this reason your petitioner cannot state more specifically and definitely the parts of streets, the
9 amounts and measurements of work done on each or when done, but said several matters and all matters pertaining thereto are fully manifest by the papers in the possession of the said Commissioners of the District of Columbia, and are not known to and cannot, therefore, be more specifically stated herein by your petitioner, but your petitioner avers definitely and specifically that the work done by the said Ballard Pavement Company under said contract upon said parts of streets designated by the said board of public works aggregated in all the sum of $139,569.85.

Your petitioner further avers that the said District of Columbia was, by the terms of said contract, to pay for said work in cash as the same progressed, and, by the regulation of the said board of

public works, the said Ballard Pavement Company were required to pay for the material used and to pay the workmen employed in executing said work also as the same progressed; that the said District of Columbia failed, neglected, and refused to pay to the said Ballard Pavement Company in cash as the said work progressed; and your petitioner avers that, in point of fact, there was never paid to or realized by the said Ballard Pavement Company in cash for said work more than fifty per cent. of the aggregate amount to which said Ballard Pavement Company was entitled under and by the terms of said contract, to wit, the sum of $69,784.92½, and that there remains still due the said Ballard Pavement Company and still unpaid to them in cash the sum of $69,784.92½.

And that, as your petitioner is informed and verily believes, there is justly and equitably due to said Ballard Pavement Company upon said contract and for the work actually done thereunder the said sum of $69,784.92½, after allowing all just credits and offsets.

That said W. W. Ballard and E. L. Marsh have assigned
10 said claim to your petitioner, as will appear by Exhibit "No. 3," annexed hereto, whereby your petitioner became the sole owner thereof, and now owns and holds the same in his own right.

*Third Count.*

Your petitioner further avers that after the making of the contract as set out in the first count hereof, and which contract has been ratified as therein stated, the said board of public works did designate certain parts of streets to be paved and in part graded by the said Ballard Pavement Company under and pursuant to said contract; that the streets parts of which were so designated are the same as those mentioned in the first count hereof, and your petitioner is not able to state the same more definitely for the reason set forth in said first count.

And your petitioner avers that the value of the paving, grading, etc., so done upon paid streets by the said Ballard Pavement Company under and in pursuance of said contract aggregated in all the sum of $139,569.85.

That by the terms of said contract it became and was the bounden duty of the said District of Columbia to pay for said work in cash as the same progressed; that by the regulation of the said defendant, through the said board of public works, the said Ballard Pavement Company was required to pay for the material used and to pay the men employed in the execution of said work from time to time promptly as the said work progressed; that by reason of said requirement the said defendant became bound to furnish to the said Ballard Pavement Company the cash with which to make payments for said material and to said men as the work progressed.

But your petitioner avers that the said defendant, by its neglect and disregard of its direct and express obligation to pay the
11 said Ballard Pavement Company in cash as the work progressed, rendered it impracticable for said Ballard Pavement Company to perform the requirement of the said board that it should

pay for the material used and to the men engaged in the execution of said work, unless the said Ballard Pavement Company would take from the defendant what was then known as auditor's certificates, made in substantially the form of Exhibit "No. 2," hereto annexed and made part hereof, which certificates had a known market value, not always the same, but approximating fifty per cent. of the amount stated in said certificate to have been audited and allowed to the party named therein for materials furnished and work done by said party; that by reason of said facts and the inability of the said Ballard Pavement Company to perform its contract or the requirement of the board as aforesaid, without being paid in cash, in whole or in part, for their said material and work, the said Ballard Pavement Company became authorized to act as agent for said defendant and for and in its behalf to sell and dispose of such certificates at their market value; and accordingly the said defendant, through its board of public works, did cause to be placed in the hands of the said Ballard Pavement Company, from time to time, for disposition as aforesaid, auditor's certificates amounting in the aggregate to said sum of $139,569.85, which certificates the said Ballard Pavement Company did, for and in behalf of the said defendant, sell upon the market, and for the aggregate of such auditor's certificates so received as aforesaid the said Ballard Pavement Company did realize in cash, from time to time, in the aggregate, approximately, the sum of $69,784.92½.

That said auditor's certificates were not promises or obligations to pay, but simply a statement of the value of the work done and materials furnished by the parties named in the same, respectively.

12. Your petitioner avers that the said Ballard Pavement Company did not take or accept said auditor's certificates in payment for their said work, but took them for disposition as aforesaid, in order to enable the said defendant to pay and the said Ballard Pavement Company to realize in part for their work and material the cash which was due said Ballard Pavement Company upon their work as the same progressed; that no other portion of said aggregate sum for the work done by the said Ballard Pavement Company for the defendant has ever been paid.

That there is now due, as your petitioner is informed and verily believes, upon the work so done the said sum of $69,784.92½, after allowing all just credits and offsets.

That said W. W. Ballard and E. L. Marsh assigned said claim to your petitioner, as will appear by Exhibit "No. 3," annexed hereto, whereby your petitioner became the sole owner thereof and now owns and holds the same in his own right.

*Fourth Count.*

Your petitioner further avers that after the making of the contract as set out in the first count hereof, and which contract has been ratified as therein stated, the said board of public works did designate certain parts of streets to be paved and in part graded by the said Ballard Pavement Company under and pursuant to said contract;

that the streets parts of which were so designated are the same as those mentioned in the first count hereof, and your petitioner is not able to state the same more definitely, for the reasons set forth in said first count.

And your petitioner avers that the value of the paving, grading, etc., so done upon said streets by the said Ballard Pavement Company under and in pursuance of said contract aggregated in all the sum of $139,569.85.

That by the terms of said contract it became and was the
13 bounden duty of the said District of Columbia to pay for said work in cash as the same progressed; that by the regulation of the said defendant, through said board of public works, the said Ballard Pavement Company was required to pay for the material used and to pay the men employed in the execution of said work, from time to time, promptly as the said work progressed; that by reason of said requirement the said defendant became bound to furnish to the said Ballard Pavement Company the cash with which to make payments for said material and to said men as the work progressed.

But your petitioner avers that the said defendant, by its neglect and disregard of its direct and express obligation to pay the said Ballard Pavement Company in cash as the work progressed, rendered it impracticable for said Ballard Pavement Company to perform the requirement of the said board that it should pay for the material used and to the men engaged in the execution of said work, unless the said Ballard Pavement Company would take from the defendant what was then known as auditor's certificates, made in substantially the form of Exhibit "No. 2," hereto annexed and made part hereof, which certificates had a known market value as a chattel or commodity, not always the same, but approximating fifty per cent. of the amount stated in said certificate to have been audited and allowed to the party named therein for materials furnished under work done by said party; that by reason of said facts and the inability of said defendant to pay in cash in accordance with its said contract the said Ballard Pavement Company did accept as a chattel or commodity at their market value certain auditor's certificates, aggregating, in the amount stated upon the face of said certificates, the sum of $139,569.85, which said certificates, as chattels or commodities, were then of the value of the sum of $69,784.92½.

Whereby and by means of the delivery of said chattels the
14 said defendant did pay to the said Ballard Pavement Company the said sum of $69,784.92½ upon the work so done by said Ballard Pavement Company for said defendant, leaving still due to said Ballard Pavement Company the said sum of $69,784.92½, after allowing all just credits and offsets.

That said W. W. Ballard and E. L. Marsh have assigned said claim to your petitioner, as will appear by Exhibit "No. 3," annexed hereto, whereby your petitioner became the sole owner thereof, and now owns and holds the same in his own right.

Your petitioner further states that the matters set up in the second, third, and fourth counts hereof are only different forms of state-

ment for the same claim, and your petitioner only claims upon either or all three thereof the one sum of $69,784.92½, with interest at six per cent. thereon from the first day of January, 1874. Said claim has not been rejected by the board of audit.

Your petitioner claims that by reason of the matters herein stated there is due him from the said District of Columbia the sum of two hundred thousand dollars, exclusive of all set-offs and just grounds of defense, and he asks judgment for said sum, with interest and costs.

TALMADGE E. BROWN.

FILLMORE BEALL,
*Washington, D. C.;*
C. C. COLE,
*Des Moines, Iowa, Counsel for Plaintiff.*

UNITED STATES OF AMERICA, *State of Iowa,* } *ss:*

I, Talmadge E. Brown, being first duly sworn, do depose and say that I am the claimant named in the foregoing petition, and that no assignment or transfer of said claim or any part thereof has been made by me, and that I am justly entitled to the amount claimed therein from the District of Columbia after allowing all just credits and offsets, and that I believe the facts as stated in said petition are true.

T. E. BROWN.

Subscribed and sworn to before me by Talmadge E. Brown, the claimant in the above cause, this sixth day of November, 1880.

[SEAL.] EDWARD R. MASON,
*Clerk U. S. Circuit Court, District of Iowa.*

EXHIBIT "No. 1."

THE BALLARD PAVEMENT COMPANY, WASHINGTON, D. C.

Your proposition of this date, as follows:

"The Ballard Pavement Company hereby make proposals for the following work, with accompanying conditions.

We will put down preserved wood pavement as follows: The Ballard block, the Perry block, or the wedge-shaped block, such as laid by Filbert & Taylor, in this city, as the contractors may elect, either to stand five inches high, for three dollars and fifty cents per square yard, and we hereby ask for seventy-five thousand square yards, contractors to have during the year 1873 within which to complete this work, the board not to stop the work without a gross violation of the contract on the part of the contractors, the streets to be designated by the board at such times as the company shall be ready to commence work, said work to be paid for as the same progresses.

We also hereby apply for a separate and a further contract for so much of the grading, hauling, and filling as is not embraced in the contract for paving, and for setting the curbing on the streets, to be

paved by us at board prices, subject to the conditions of the paving contract."

Is this day accepted.

By order of the board.

CHARLES S. JOHNSON,
*Assistant Secretary.*

16 EXHIBIT "No. 2."

No. —. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., —— —, 187–.

I hereby certify that I have this day audited and allowed the account of —— —— for ——, amounting to $——.

—— ——, *Auditor.*

EXHIBIT "No. 3."

This is to certify that the Ballard Pavement Co., composed of W. W. Ballard, T. E. Brown, and B. L. Marsh, have sustained great losses in consequence of the failure of the District of Columbia to perform its contracts with said company and pay said company its just dues, and that the debts of the company, some fifty thousand dollars ($50,000,00), have been paid in part and the remainder assumed by said Brown.

Now, therefore, in consideration of the premises, the said Ballard and Marsh hereby assign, transfer, and set over unto the said Brown all of their interest of whatever kind in any of the assets, claims, contracts, suits brought and to be brought, claims for royalty, and damages for infringements of patents, damages for breaches of contract, balances due for work and labor performed, differences between the market value of certificates received by said company and the face value thereof, and any and all other rights, equities, and causes of action against any and all parties whomsoever.

Dated at Washington, D. C., this 20th day of June, A. D. 1874.

W. W. BALLARD.
E. L. MARSH.

17 *Traverse.*

In the Court of Claims of the United States. December Term, A. D. 1880.

TALMADGE E. BROWN,
*vs.*
THE DISTRICT OF COLUMBIA. } No. 145.

And now comes the Attorney Generel, on behalf of the District of Columbia, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
*Assistant Attorney General.*

18 *Plea.*

In the Court of Claims of the United States.

TALMADGE E. BROWN
*vs.*
THE DISTRICT OF COLUMBIA. } No. 145.

Plea of *res adjudicata* in nature of estoppel. Filed April 6, 1881.

Now comes the Attorney General, on behalf of the District of Columbia, and, for plea to the first count of the claimant's petition, says—

That the claimant ought not to be admitted to have or maintain against the defendant the said claim, because he says that the claimant before this suit brought an action against the defendant in the supreme court of the District of Columbia to recover damages for the same alleged breach of the same alleged contract as claimed in his petition in this suit, and thereupon such proceedings were had that afterwards and before this suit it was considered by the judgment of the said court that plaintiff in said action (to wit, the claimant in this suit) should take nothing by his writ in respect of the said damages, as by the record of the said court fully appears, and which said judgment is still in full force, and this defendant is ready to verify.

Wherefore he prays judgment if the claimant ought to be admitted against the said record to further have or maintain his said action.

THOMAS SIMONS,
*Assistant Attorney General.*

12605.

19 *Replication.*

In the United States Court of Claims.

TALMADGE E. BROWN, Claimant,
*vs.*
THE DISTRICT OF COLUMBIA. } No. 145.

Now comes the plaintiff and, for replication to defendant's plea of *res adjudicata* pleaded to the first count of plaintiff's petition, says—

First. That the plaintiff, by reason of anything by the said defendant in said plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith that there is not any record of the said supposed adjudication in the said plea mentioned remaining in the said supreme court of the District of Columbia in manner and form as the said defendant hath in his said plea alleged.

Second. That said plaintiff, as to the said plea of *res adjudicata* of the said defendant herein pleaded to the first count of the petition, saith that the said plaintiff, by reason of anything in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith

that the said several acts, promises, and undertakings in the said petition mentioned were not of the same identical acts, promises, and undertakings as those in the said plea mentioned, and for and in respect whereof the said supposed judgment in the said plea mentioned was recovered in manner and form as the said defendant hath in his said plea alleged.

Third. And, for a further replication, the said plaintiff, as to the said plea of *res adjudicata* of the said defendant pleaded to the first count of said petition, saith that the said plaintiff, by reason of anything by the said defendant in that plea
20 alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he says that since the said supposed adjudication in the said plea mentioned remaining in the said supreme court of the District of Columbia an act of Congress entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," approved June 16th, 1880, was enacted, whereby the right of action in this Court upon the said claim, as stated in said supposed action, was given to said plaintiff, notwithstanding the supposed adjudication in the said plea mentioned.

Fourth. And the said plaintiff, as to the said plea of *res adjudicata* of the said defendant pleaded to the first count of said plaintiff's petition, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith that the cause of action in the declaration set out in the said supposed record in the said plea mentioned had, before the bringing of said action, been sold, assigned, and transferred to another by the plaintiffs in said action prior to the bringing of said supposed action in said plea mentioned.

Fifth. And, for a further replication, the said plaintiff, as to the said plea of *res adjudicata* of the said defendant pleaded to the first count of the said petition, saith that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith that the attorney who appeared in said action and claimed to be the attorney for
21 the plaintiff therein was not, in fact, in any manner authorized by the plaintiff therein to bring said action or to appear therein for said plaintiff, and that the said plaintiff in said supposed action in said plea mentioned had no knowledge whatever of the said action or of the adjudication therein until long after the time for appealing therefrom had transpired, and that said supposed adjudication in said plea mentioned was made and rendered by said court without any jurisdiction over the plaintiff therein, and that said supposed adjudication in said plea mentioned was and is entirely and wholly null and void.

C. C. COLE AND
FILLMORE BEALL,
*Att'ys for Plaintiff.*

22 *Findings of Fact.*

Court of Claims.

TALMADGE E. BROWN
*vs.*
THE DISTRICT OF COLUMBIA. } No. 145.

This case having been heard before the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

I.

In December, 1872, and afterwards there existed a copartnership called the Ballard Pavement Company, which was composed of William W. Ballard, Edward L. Marsh, and Talmadge E. Brown, the claimant; and said company had a business office in the city of New York.

II.

In the early part of that month the said William W. Ballard and the claimant were in the city of Washington, and they had verbal negotiations with Alexander R. Shepherd, then and afterwards a member and vice-president of the board of public works of the District of Columbia, which negotiations led them to write and send to that board a paper, a copy of which is given in the letter signed "Chas. S. Johnson, ass't secretary," set forth in the next succeeding finding.

III.

The following is the letter referred to in the next preceding finding:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, *Dec'r 10th*, 1872.

The Ballard Pavement Co., Washington, D. C.:

Your proposition of this date as follows:

"The Ballard Pavement Co. hereby makes proposals for the following work with accompanying conditions: We will put down preserved wood pavement as follows, the Ballard block, the Perry block, or the wedge-shaped block, such as laid by Filbert & Taylor in this city, as the contractors may elect, either to stand five inches high, for three dollars and fifty cents per square yard; and we hereby ask for seventy-five thousand square yards, contractors to have during the year 1873 within which to complete this work; the board not to stop the work without a gross violation of the contract on the part of the contractors; the streets to be designated by the board at such times as the company shall be ready to commence work; said work to be paid for as the same progresses.

"We also hereby apply for a separate and a further contract for so much of the grading, hauling, and filling as is not embraced in the contract for paving and for settng the curbing on the streets to

be paved by us at board prices, subject to conditions of the paving contract,"

Is this day accepted.

By order of the board.

CHAS. S. JOHNSON,
*Ass't Secretary.*

23 The said Charles S. Johnson was a clerk in the employment of the board of public works and was styled assistant secretary.

The journal of said board does not show that said proposition was ever before the board, nor does any acceptance thereof by the board appear otherwise than by the statement of said letter; nor does it appear that said Johnson was authorized by said board to write said letter, unless it should be inferred from his being a clerk of the board and styled assistant secretary; nor does it appear that the board or any member of it, except Alexander R. Shepherd, either saw or knew of said letter before or on the said 10th of December, 1872; nor can the original proposition, as drawn up by the claimant and said Ballard, be anywhere found among the papers or files of the board or of the District of Columbia, though searched for there; nor can any copy of said Johnson's letter be found in the books or files of the board or of the said District, though searched for there and though it was the practice of the board to keep press copies of the letters that went out of its office.

IV.

In all the transactions hereinafter set forth, connected with the matter of paving streets by the said company, it does not appear that any member of the company was before the said board, at any meeting thereof, in relation to that work. Their intercourse in regard to it was almost wholly with said Alexander R. Shepherd. It took place sometimes at his store and sometimes at the office of the board. When it took place at his store it does not appear that any other member of the board was present; when it took place at the office of the board, if other members of the board were present and any member of the company spoke to them about the matter of that work, they would refer him to said Shepherd.

When the company desired work to be designated for them to do they called on said Shepherd, supposing that whenever he said anything about the work in the District he represented the board of public works; was the mouth-piece of the board.

V.

The said company, after receiving said Johnson's letter, proceeded to make preparations for laying down wooden pavement on streets in the District of Columbia, and made a contract for three million feet of lumber, estimated by them to be sufficient to make 75,000 square yards of pavement.

VI.

In the spring of the year 1873 the company notified the board, through said Shepherd, that they were ready to proceed with the work of paving streets, and requested that such work should be designated for them to do; but none was designated until the latter part of June or beginning of July, when some parts of streets were designated and the company entered on the work of paving them. After doing so, and before they were allowed to receive any certificates of measurement showing work to have been done, they were required to enter into a written contract embracing the work
24 and to give bond for its performance. They at first declined to sign such a contract, claiming that the terms contained in it were different from those of their proposition of December 10, 1872; but they afterwards signed the following contract:

*Contract* 736.

This contract, made and concluded this fifth day of July, in the year one thousand eight hundred and seventy-three, by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, Adolf Cluss, and Henry A. Willard, constituting and composing the board of public works of the District of Columbia, of the first part, and William W. Ballard, for and in behalf of the Ballard Pavement Company of New York City, N. Y., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained and under the penalty expressed in a bond bearing even date with these presents and hereunto annexed, to furnish, at his own proper cost and expense, all the necessary materials and labor, and, in a good, firm, and substantial manner, to lay and put down the pavement known as and called the Taylor and Filbert wood pavement, on the carriageway of Seventh street N. W., between D and E streets N. W., and on the carriageway of said Seventh street N. W., between G and M streets N. W., in the city of Washington, D. C.

The wooden blocks of said wooden pavement to be treated after the process known as and called the Burnettizing process, in accordance with the specifications following for Burnettizing, or the process known as and called the Robbins process, in accordance with letters patent numbered forty-seven thousand one hundred and thirty-two (No. 47132) and dated April four (4), eighteen hundred and sixty-five (1865), on file in United States Patent Office, and the said so-called Taylor and Filbert.

Second. It is further agreed that the said party of the first part shall appoint from time to time such persons or person as may be by said party deemed proper to inspect the material to be furnished and the work to be done under this contract, and that such persons or person shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

Third. It is further agreed that the work under this contract shall be commenced immediately.

Fourth. It is further agreed that the said party of the first part may, on notice to the said party of the second part, suspend work under this contract, but, if not suspended, it shall be completed within sixty (60) days from the date fixed for its commencement, and that the said work shall not be sublet without the consent in writing of the said party of the first part, and that any subletting or assignment without such consent shall work a forfeiture of this contract.

Fifth. It is further agreed that if, at any time, the party of the first part shall be of opinion that the said work or any part thereof is unnecessarily delayed or that the said contractor is willfully violating any of the conditions or covenants of this contract or is executing the same in bad faith, all of the work may be discontinued under this contract or any part thereof; and the said party of the first part shall thereupon have the power to place such and so many persons as may be deemed advisable, by contract or otherwise, to work at and complete the work herein described or any part thereof, and to use such materials as may be found upon the line of said work, or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the said party of the second part, and the expense so charged shall be deducted and paid, by the said party of the first part, out of such moneys as may be then due or may at any time thereafter grow due to the said party of the second part under and by virtue of this agreement or any part thereof; and, in case such expense is less than the sum which would have been payable under this contract if the same had been completed, the said party of the second part shall be entitled to receive the difference; and, in case such expense shall exceed the last said sum, the amount of such excess shall be paid to the said party of the first part by the said party of the second part.

Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same or from the action of the elements or from incumbrances or injuries to individuals, property, or otherwise on the line of the work or adjacent thereto shall be sustained by the said contractor, and the said contractor hereby agrees, in the execution of the said work as aforesaid, to keep at all times the said work properly guarded or protected, so as to prevent all injuries to persons, travelers, animals, or property; and, in the event of any such injury or injuries occurring in consequence of the insufficient guarding or protection of said work as aforesaid, the said party of the first part shall retain, out of any money or moneys due or to become due said contractor, a sum sufficient to cover all damages arising out of said injury or injuries until the same may be settled at law otherwise.

Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him

on work under this contract in cash current, and not in what is denominated store-pay or orders; and that he will, from time to time, and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required; and if such evidence is not furnished, such sum or sums as may be necessary for such payment or claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the board of public works aforesaid, and that whenever the said chief engineer aforesaid shall certify in writing that the party of the second part has completely performed this contract on his part, and shall submit with said certificate his estimate of the amount due the party of the second part, then, within thirty (30) days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made, as hereinafter mentioned.

And it is further expressly agreed that no money shall become payable under this contract except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract: Provided, That partial payments may be made, under direction of the said party of the first part, otherwise than upon the estimates of the said engineer, as provided above, if, in the opinion of the said party of the first part, the vigorous prosecution of the work will be promoted thereby.

Ninth. It is further agreed that if at any time during the period of three (3) years from the completion of the work to be done under this contract any part or parts thereof shall become defective from imperfect or improper material or construction, and in the opinion of the said party of the first part require repair, the said party of the second part will, on being notified thereof, immediately commence and complete the same to the satisfaction of the said party of the first part, and, in case of a failure or neglect of the said party of the second part so to do, the same shall be done under the direction and orders of the said party of the first part at the cost and expense of the said party of the second part.

Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prose-

cution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

Laying and putting down the said Taylor and Filbert pavement, treated as aforesaid, per square yard, three dollars and fifty cents ($3.50) *cents*, which shall include two (2) feet of grading, which said sums or prices the said party of the first part shall pay to the said party of the second part, as herein provided.

Eleventh. And it is further agreed that should any litigation arise in any way connected with the work embraced as aforesaid in this contract, from or by reason of any demand or demands, claim or claims, by any person or persons, to use within the said District of Columbia the improvement or pavement or pavements contracted for herein to be laid and put down by the said party of the second part, under or by reason of any patent or assignment of patent, either in the form of royalty or damages or in any otherwise, the said party of the second part will indemnify and save harmless the said party of the first part from all said demand or demands, claim or claims, whether arising out of suits or otherwise; and the said party of the first part may, at its option, retain from the amount or amounts due or to become due under this contract to the said party of the second part a sum or sums necessary or sufficient to satisfy or liquidate all of said demands or claims as aforesaid until they shall be amicably adjusted or finally determined at law.

Twelfth. It is further agreed that the measurements shall be made by the engineer of the said party of the first part or his assistants.

Thirteenth. And the said party, constituting and composing the board of public works in and for the District of Columbia aforesaid, agree with the said party of the second part to perform all the stipulations of this contract obligatory in it and to pay or cause to be paid to the said party of the second part or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found from time to time due him according to the contract.

26 Fourteenth. It is further agreed that this contract shall be subject to any and all provisions of an act entitled "An act to provide a government for the District of Columbia," approved February 21, 1871, so far as the same shall or may be in any respect applicable to said contract, and also to any law of the District of Columbia pertinent thereto or to any part thereof, as fully as if the same were particularly set forth herein.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

H. D. COOKE, [L. S.]
ALEX. R. SHEPHERD, [L. S.]
JAMES A. MAGRUDER, [L. S.]
ADOLPH CLUSS, [L. S.]
H. A. WILLARD, [L. S.]

*Board of Public Works of the District of Columbia.*

BALLARD PAVEMENT CO.,
Per W. W. BALLARD, *Contractors.*

Signed and sealed in presence of—
F. H. JOHNSON.
JOHN A. HURLEY.

For the due performance of this contract the claimant and said Ballard entered into a penal bond in the sum of $20,000, with surety, to the board of public works.

VII.

After said contract was entered into other streets or parts of streets were from time to time designated for said company to pave, and four other contracts were entered into between the company and the board, each in the same form as that set out in finding VI, for the paving of such other streets or parts of streets; and in each case bond, with surety, was given by the company for the due performance of the contract. The said four other contracts were numbered and bore date as follows: No. 838, dated August 12, 1873; No. 900, dated September 15, 1873; No. 935, dated October 13, 1873, and No. 997, dated December 9, 1873.

All of the five contracts mentioned in this finding and finding VI were entered into by the company because unless the same were entered into the officers of the board refused to furnish the company with official measurements of the work done, and without such measurements the company could neither get payment for the work nor any official written evidence of what was due them on account thereof.

None of said five contracts was signed by the parties before the work specified in them was commenced, and some of them were signed after the work specified in them was finished.

It does not appear that the Ballard Pavement Company made written application or bid to the board for the work specified in said contracts, but the company received written notices, signed "Board of Public Works, by Charles S. Johnson, assistant secretary," that such a street or streets were awarded to them for them to go on and pave within a certain time.

VIII.

From time to time, as the company completed work, they obtained measurements thereof made and certified in writing by the engineer of the board. Each certificate of the engineer stated the
27 location, character, quantity, and price of the work done and the number of the contract under which it was done, and the following is the form used in making such certificates:

I hereby certify that I have measured and inspected the work done by Ballard Paving Co. on the improvement of —— street, embraced in his bill dated ——, 1873, which work was done under the order of the board of public works (contract No. —, 187–), and find it correct as to quantity and quality, and that the work has been done and material and labor furnished, as per contract and specifications.

IX.

It does not appear that any engineer's certificate of measurement of any of said work made any reference to the paper of December 10, 1872, set forth in finding III; but each and every one stated the work to have been done under one or the other of the contracts referred to in findings VI and VII; nor does it appear that the company laid any wooden pavement for the board, except that which was specified in the said five contracts.

X.

From time to time as the work under said contracts progressed and the company received from the engineer of the board certificates of measurement, as stated in finding VIII, they, on presenting any such certificate to the auditor of the board, received from that officer and signed a receipt at the bottom of the engineer's certificate for the auditor's certificate of audit and allowance in favor of the company for the amount shown by the engineer's certificate to be due them; and the auditor's certificate in every such case was in a form of which the following is an instance:

No. 3236.

OFFICE OF AUDITOR BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *October 6th*, 1873.

I hereby certify that I have this day audited and allowed the account of Ballard Pavement Co. for work on 7th St. west, bet. D and E and G and M Sts. north, amounting to five thousand dollars.

$5,000. J. C. LAY, *Auditor.*

XI.

The aggregate amount of work done by the company under said contracts and extension was $163,669.56.

The aggregate amount of auditor's certificates issued to the company was $146,008.55.

In addition to that the board furnished the company materials for the work to the amount of $13,991.97, and the company also received certificates of the board of audit to the amount of $3,669.04.

The said auditor's certificates were voluntarily received by the company merely as evidence of what was due them from the board at the times the certificates were respectively given, and it does not appear that there was any agreement or understanding between the company and the board in regard to what disposition the company should make of them.

XII.

When the company were doing the work under said contracts and receiving therefor auditor's certificates as aforesaid, there
28 were great numbers of like certificates issued to many other contractors for other work, and such certificates were in the

city of Washington and elsewhere a recognized commodity for sale, with a value changing from time to time.

From the beginning of their receiving certificates of that description for work done as aforesaid the company went into the market with them and sold them for such prices as they could obtain for them and delivered them to the purchasers. What the prices were does not appear, but only that the general average was from 50 to 55 cents on the dollar of their face value.

It does not appear that the board had any knowledge of the company's making any such disposition of any of said certificates.

XIII.

The whole number of square yards of wood pavement laid by the company under said five contracts was 37,128, and the last auditor's certificates received by the company on account of that work were dated January 24, 1874, after which date no further streets or parts of streets were designated for them to pave before the board ceased to exist, on the 20th of June, 1874, though the company repeatedly called on said Shepherd, sometimes in the presence of other members of the board, to designate more; and the commissioners of the District of Columbia refused to allow any more wood pavement to be put down.

XIV.

On the 6th of January, 1875, the said Ballard Pavement Company instituted in the supreme court of the District of Columbia a suit against said District, wherein, on the 22d of April, 1875, there was filed the following amended declaration:

*Amended Petition.*

WILLIAM W. BALLARD, TALMADGE E. BROWN, & EDWARD L. MARSH,
*vs.*
THE DISTRICT OF COLUMBIA.

To the supreme court of the District of Columbia:

The plaintiffs in foregoing-entitled cause claim there is due them from the said District of Columbia one hundred thousand dollars, and for cause of such claim set up and allege the following, to wit:

That on or about the 10th day of December, A. D. 1872, they, trading under the name and style of The Ballard Pavement Company, made and completed a contract with the said District of Columbia whereby they became bound to pave certain streets with wood pavement and to excavate and do certain other work in the contract particularly set forth, and within the time and in the manner and for the considerations set forth and detailed in said contract, a copy of which is attached hereto as Exhibit A and made a part hereof, which said contract was lawfully made by the board of public works for and in behalf of the District of Columbia, and was properly authenticated by Charles S. Johnson, the assistant sec-

retary of the board of public works, who was duly authorized by the said board for and in its behalf, as well as for the said District of Columbia, to accept and sign the said contract in the manner therein shown; that when the said contract was made and entered into as aforesaid there were ample and sufficient moneys appropriated to meet the expenditure contemplated under the said contract, and that by reason whereof the said District of Columbia was bound to carry out the provisions of said contract and become liable to the damages hereinafter stated.

29 Plaintiffs allege that by virtue of this contract the District of Columbia became bound to designate the work from time to time as called for by plaintiffs, to pay for the same in cash as the work progressed, and in all things as therein stipulated to perform the covenants of this contract, as therein set forth; but plaintiffs allege that although they entered upon their part of the contract, provided the material with which to do the said work, and from shortly after the making of the contract hitherto they have been prepared and ready to do the said work according to their said contract, that they have repeatedly demanded the said work of the proper authorities representing the District, which authorities have at all times neglected and refused to designate the work, or any part thereof, under said contract, and have at all times neglected and refused to peform any part thereof, though often requested so to do by plaintiffs.

Plaintiffs further allege that the Congress of the United States, in legislating for the District of Columbia, passed an act, approved on the 20th day of June, A. D. 1874, whereby the contract alluded to herein and kindred contracts made by the District of Columbia with divers and sundry parties were recognized, confirmed, and ratified, and a board of audit created for the purpose of auditing claims for the work to be done under said contracts, and provided the means for paying the same.

Your petitioners further allege that they did, within the time prescribed in said act, file their claim for damages growing out of the breach of the District under said contract with the board of audit, who failed, neglected, and refused to audit the same, or to take any of the steps provided in said act.

Wherefore, and by reason of the allegations hereinbefore set forth, your petitioners allege that they have been greatly damaged, to wit, in the sum of one hundred thousand dollars, and they ask judgment for that amount, with costs.

JOHN A. GROW & CO.,
*Att'ys for Plaintiffs.*

The Exhibit A referred to in and made part of said declaration was the same letter signed "Chas. S. Johnson, ass't secretary," which is above set forth in finding III.

To the said amended declaration the defendant filed a general demurrer, saying that the declaration was bad in substance; and on said demurrer the said court, sitting in general term, on the 1st of

March, 1877, rendered the following judgment, and entered the same of record:

BALLARD PAVING CO., Pl'ff,
*vs.*
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 13494.

And now again come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, after argument of the cause by Mr. Grow on behalf of the plaintiff, and the submission of said cause to the court, because it appears to the court that the declaration is bad in substance, it is considered by the court that the demurrer thereto be, and the same is hereby, sustained, and that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the cost of its defense, to be taxed by the clerk, and have execution thereof.

This judgment does not appear to have been reversed or set aside.

## XV.

Before the board of audit, constituted by section 6 of the act of June 20, 1874, "for the government of the District of Columbia and for other purposes" (18 Stat. L., 116), the Ballard Pavement Company, on the 1st of September, 1874, presented the following petition:

To the hon. board of audit for the District of Columbia:

Comes now the Ballard Pavement Co. and file this their claim for audit under class 4 of the act of Congress of date June —, 1874, fixing the amount due them under said class 4 in the bonds provided for by said act at $75,000.00, and, for cause of such claim, set up and allege the following: That on the 10th day of Dec., 1872, they entered into a written contract with the board of public
30 works for putting down 75,000 square yards of wood pavement within the said District, a copy of which is attached hereto as Exhibit A and made a part hereof; that said company entered upon the performance of the work, and as early as the 8th day of January, 1873, purchased and procured all of the lumber, and in the spring and summer following purchased the other materials necessary for the fulfillment of this entire work; that as early as March, 1873, said company asked the board of public works to designate the streets to be paved; that after long delays and very great damages had been sustained by your petitioners under circumstances of peculiar hardships to your petitioners, they were finally able to have designated under said contract 35,000 square yards, which was completed to the satisfaction of the board during the year 1873. This is all of the work the said company have been able to procure from the making of the contract to the present time, though at all times ready and prepared to do the same, and though no claim or pretense has ever been made that your petitioners had in any respect violated the contract on their part. Said company allege that they have been damaged by reason of all of said failures on the part of

the board of public works to comply with the terms of said agreement in the said sum of $75,000.00; all of which they are ready and prepared to establish by such evidence and proofs and at such time and place as this honorable board of audit shall require.

And your petitioners will ever pray.

Sept. 1, 1874.

BALLARD PAVEMENT CO.,
117 *Broadway, New York.*

Exhibit A referred to in this petition was the same letter signed "Chas. S. Johnson, ass't secretary," which is above set forth in finding III.

Upon the jacket wherein this petition and exhibit were inclosed this indorsement was made:

OFFICE BOARD OF AUDIT,
WASHINGTON, *August* 3, 1874.

*Class* 4, *No.* 239.

Claims against the board of public works for which no evidence of indebtedness has been issued.

Claims damages for breach of contract in the sum of $75,000.

And on the opposite side of said jacket was written:

The within claim against the board of public works has been examined and not allowed.

The board of audit kept a record of claims allowed and disallowed, in which appear the following:

*Record of Claims, Class* 4.

| Date. | No. of claim. | Name. | Description of work. | Certificate number. | Claimed. | Allowed. | Disallowed. |
|---|---|---|---|---|---|---|---|
| 1874. Aug. 3. | 239 | Ballard Pavement Co... | Breach of contract.. | ..... | 75,000 | ..... | 75,000 |

And the members of the board of audit reported said claim to Congress in a list of disallowed claims.

XVI.

If, after January 24, 1874, the board of public works had designated more streets to be paved by the Ballard Pavement Company on the terms specified in the said five contracts and the company had paved them and had been paid therefor in cash the company would have realized a profit thereon, but if the company had received auditor's certificates for the work and had sold them at 50 to 55 cents on their face value, as they did those received under said five contracts, then they would have lost money on any additional streets paved by them on those terms.

31

## XVII.

June 20, 1874, the said William W. Ballard and Edward L. Marsh executed and delivered to the claimant the following instrument of transfer and assignment:

This is to certify that the Ballard Pavement Co., composed of W. W. Ballard, T. E. Brown, and E. L. Marsh, have sustained great losses in consequence of the failure of the District of Columbia to perform its contracts with said company and pay said company its just dues, and that the debts of the company, some fifty thousand ($50,000) dollars, have been paid in part and the remainder assumed by said Brown. Now, therefore, in consideration of the premises, the said Ballard and Marsh hereby assign, transfer, and set over unto the said Brown all of their interest, of whatever kind, in any of the assets, claims, contracts, suits brought and to be brought, claims for royalty and damages for infringements of patents, damages for breaches of contract, balances due for work and labor performed, differences between the market value of certificates received by said company and the face value thereof, and any and all other rights, equities, and causes of action against any and all parties whomsoever.

Dated, at Washington, D. C., this 20th day of June, A. D. 1874.

W. W. BALLARD.
E. L. MARSH.

Upon the foregoing facts the conclusion of law is that the claimant's petition be dismissed on the grounds set forth in the following

*Opinion.*

DRAKE, *Ch. J.*, delivered the opinion of the court:

A rule of this Court requires the petition in any suit brought here to set forth a "plain, concise statement of the facts and circumstances, free from argumentative and impertinent matter."

The petition in this case contains four counts, the first of which is complete in itself, but the other three, the claimant says, are only different forms of statement of the same claim, and under either or all of them he only claims the one sum named in them.

The first count proceeds upon a written contract alleged to have been entered into December 10, 1872, between the board of public works of the District of Columbia and the Ballard Pavement Company for laying down wooden pavements, the only evidence of which contract disclosed by the findings is the following letter, written to that company by one Charles S. Johnson, a clerk of the board, who was styled assistant secretary:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
WASHINGTON, *Dec'r 10th*, 1872.

The Ballard Pavement Co., Washington, D. C.:

Your proposition of this date, as follows: "The Ballard Pavement Co. hereby make proposals for the following work with accompanying conditions: We will put down preserved wood pavement as follows: The Ballard block, the Perry block, or the wedge-shape block, such as laid by Filbert & Taylor in this city, as the contractors may elect, either to stand five inches high, for three dollars and fifty cents per square yard; and we hereby ask for seventy-five thousand square yards, contractors to have during the year 1873 within
32 which to complete this work; the board not to stop the work without a gross violation of the contract on the part of the contractors; the streets to be designated by the board at such times as the company shall be ready to commence work; said work to be paid for as the same progresses. We also hereby apply for a separate and a further contract for so much of the grading, hauling, and filling as is not embraced in the contract for paving and for setting the curbing on the streets to be paved by us at board prices, subject to conditions of the paving contract," is this day accepted.

By order of the board.

CHAS. S. JOHNSON,
*Ass't Secretary.*

This count alleges that "in pursuance of said contract and in part execution and performance thereof" the board designated nine different pieces of work to be done by the company, all of which the company did to an aggregate amount of about 35,000 square yards, and were prepared and ready to do all the rest of the 75,000 square yards specified in their proposition, but the board failed and refused to designate any more work to be done by the company, whereby they were damaged in the sum of $100,000.

The second, third, and fourth counts all refer to the work actually done by the company, for which they received certificates of the auditor of the board, stating amounts due the company, which certificates the company sold at about 50 cents on the dollar, realizing therefrom only $69,784.92½, and the claimant demands from the defendant the other half of the amount of the certificates on the following grounds: 1, that work was by the terms of the supposed contract to be paid for in cash as it progressed, and the board failed so to pay; 2, that by failing so to pay them and giving them auditor's certificates the company became authorized to act as agent of the board, and on its behalf to sell the certificates at their market value, and the company did sell them on behalf of the board at 50 cents on the dollar of their face value; and, 3, that the company accepted the certificates as chattels and commodities at their market value, which was then 50 cents on the dollar, after realizing which from their sale there remained due to the company the other half of the aggregate sum, viz., $69,784.92½.

For this sum the claimant sues alone, his copartners having transferred to him all their interest in the claim.

Having thus preliminarily stated the case as presented in the petition we proceed to examine the case made by the facts. In regard to those facts we deem it proper to say that they have been found almost wholly on the evidence of the claimant and his former partners in the Ballard Pavement Company. If, therefore, their case has not been satisfactorily established the presumption is that they had not a very establishable case.

The great point in the case is whether the proposition made by the company to the board of public works, and which the letter of Johnson said had been "accepted by order of the board," constituted a contract between the company and the board.

Under some circumstances we can see that it might be plausibly if not forcibly contended that a written proposition signed by a party and made to the board, and by the board accepted in writing, would meet the statutory requirement (16 Stat. L., 247, § 37), that "all contracts made by the board of public works shall be in writing, and shall be signed by the parties making the same;" but that is by no means this case.

The question here is whether the board did, in fact, accept the company's proposition. If it did not then there is no foundation, in whole or in part, for the claimant's case as stated in the petition.

33 The only fact found tending to prove such an acceptance is the letter of Johnson. What that document, standing by itself, might be held to establish is not a question before us, but what it proves in connection with other facts found and with still others which might be expected to appear in the case but are found not to appear; in reference to which points we transcribe here this portion of finding III:

The journal of said board does not show that said proposition was ever before the board, nor does any acceptance thereof by the board appear, otherwise than by the statement of said letter; nor does it appear that said Johnson was authorized by said board to write said letter, unless it should be inferred from his being a clerk of the board and styled assistant secretary; nor does it appear that the board or any member of it, except Alexander R. Shepherd, either saw or knew of said letter before or on the said 10th of December, 1872; nor can the original proposition as drawn up by the claimant and said Ballard be anywhere found among the papers or files of the board or of the District of Columbia, though searched for there; nor can any copy of said Johnson's letter be found in the books or files of the board or of the said District, though searched for there, and though it was the practice of the board to keep press copies of the letters that went out of its office.

Upon these facts we have no hesitation in concluding that the letter of Johnson was not authorized by the board, and therefore could have no effect in law to bind the board.

Does this necessarily imply a charge against Johnson of having, without authority from any official quarter, written a letter stating

a falsehood? It might have that effect but for the facts set out in finding IV, as follows:

In all the transactions hereinafter set forth connected with the matter of paving streets by the said company it does not appear that any member of the company was before the said board at any meeting thereof in relation to that work. Their intercourse in regard to it was almost wholly with said Alexander R. Shepherd. It took place sometimes at his store and sometimes at the office of the board. When it took place at his store it does not appear that any other member of the board was present; when it took place at the office of the board if other members of the board were present and any member of the company spoke to them about the matter of that work they would refer him to said Shepherd. When the company desired work to be designated for them to do they called on said Shepherd, supposing that whenever he said anything about the work in the District he represented the board of public works—was the mouthpiece of the board.

The facts thus stated are found almost in the words of the claimant and the other members of the Ballard Pavement Company, and they have historical value as well as an important bearing upon this case. They lead us irresistibly to the conclusion that this was one of the cases in which Alexander R. Shepherd was dealt with by outside parties on the supposition, if not conviction, that he was, for all practical purposes, the board of public works, as he probably was to a great extent towards them, but more especially toward the employees in the office of the board.

It is only just to Johnson to hold that he would not have written that letter without some official authorization which seemed to him sufficient. It does not explicitly appear who gave him authority or direction to write it, but it is certain that the board of public works did not give it. It is also certain that the findings do not disclose any other person than Shepherd to whom was conceded such authority in the business of the board as led it to be supposed that he was in effect the board itself. Such being the case, we have only to recur to the fact stated in finding II, that the claimant and Ballard had been in negotiation with Shepherd before they wrote the company's proposition, to be satisfied that it was he who authorized Johnson to write the letter.

If he did, then the point is whether the letter was legally
34 binding on the board. This is very much like the question that we passed on in the Neuchatel Paving Co.'s Case, 17 C. Cls. R., 386. There it was whether Shepherd's agreements uttered in conversations bound that body, and we held that they did not. Here it is whether his verbal direction—for none in writing is shown—to Johnson to write the letter had the effect of making the letter the act of the board, and we are clear in holding that it did not.

In no view that has seemed to us worthy of acceptance is the letter of Johnson of the least value to the claimant's case, and we therefore put it wholly aside, along with the proposition which it pur-

ported to answer. With them out of the case the whole claim of the first count for $100,000 damages falls to the ground.

And yet it is one of the remarkable features of this case that the claimant rests his whole demand on that proposition, in the face of its being proved and found that no officer of the board ever recognized that proposition as a contract; that the engineer of the board refused to give the company any measurements of work unless there was a regular written contract signed by the board; that five of such contracts were entered into and signed by the board and the company; that every yard of pavement laid by the company was laid under one or the other of those five contracts; that every engineer's certificate of measurement gave on its face the number of one of those contracts as that under which the work named in the certificate had been done; that the company signed a receipt for every such certificate, and that upon those certificates the company received the auditor's certificates, which they voluntarily sold in the market for about 50 cents on the dollar.

Notwithstanding these indisputable facts the petition takes up the transactions under those five contracts and treats them as if they had occurred under the proposition of December 10, 1872. There is not the least justification for this attempt to shift the case from its true basis to a false one. If the company suffered the losses averred in the petition it was under the said five contracts and not at all in connection with that proposition, and therefore they could not possibly be recovered for under a petition which relies wholly on that proposition and entirely ignores those contracts.

Another and more remarkable feature of the case is, that while the petition avers that the company sold the auditor's certificates at a loss of about one-half of their face value, the argument of claimant's counsel at the trial proceeded wholly upon the assumption that the company had hypothecated the certificates, and because the board did not pay the company in cash as the work progressed they could not redeem the certificates, which thereby were lost to them. The facts as found furnish no ground for such a claim. We find that the company received the certificates merely as evidence of what was due them, and went into the market and sold them, and that there was no agreement between the company and the board as to what the company should do with the certificates, and that it does not appear that the board had any knowledge of what the company did with them. This disposes of the whole claim resting on the supposed hypothecation. It had nothing to do with the case stated in the petition, and now that the facts have been judicially found it is plain that it has nothing to do with the real case presented by those facts.

35 The next matter to be disposed of is the plea of *res adjudicata* based on the action of the supreme court of the District of Columbia in a suit brought by William W. Ballard, Edward L. Marsh, and the claimant, as the Ballard Pavement Company, against the District to recover damages alleged to have been sustained by them under the said proposition and said Johnson's letter, by reason that the proper authorities of the District had neglected and refused

to designate the work or any part thereof under the contract alleged to have been made by that letter, though often requested by the company so to do, whereby the company had sustained damage in the sum of $100,000.

The defendant demurred to the declaration in the supreme court of the District on the ground that it was bad in substance, which, we are advised, is the form of general demurrer in use in that court.

This demurrer the court sustained and rendered a judgment, of which the following is the record entry:

And now again come here, as well the plaintiff as the defendant, by their respective attorneys, and thereupon, after argument of the cause by Mr. Grow on behalf of the plaintiff and the submission of said cause to the court, because it appears to the court that the declaration is bad in substance, it is considered by the court that the demurrer thereto be, and the same is hereby, sustained, and that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the costs of its defense, to be taxed by the clerk, and have execution thereof.

Is this judgment a bar to the present suit, so far as the cause of action in the first count is concerned?

The parties are not identical in person, but they are in interest. The only difference is that all the partners sued there, while here only one sues, he having become the assignee of the interest of his copartners.

The supposed contract is identical with that set up in the petition in this case, and the breach alleged is the same in kind, but not in degree, as that alleged in the first count of the petition. In the other court they sued for a total breach of the contract by the refusal to designate any work to be done under it, while here the refusal is averred to have extended to only 40,000 out of the 75,000 cubic yards specified in the paper of December 10, 1872. If the judgment on the demurrer would be a bar to a new suit for withholding the whole work it is a bar to a suit for withholding a part of the work. The question, then, is whether a judgment on demurrer is a bar to a subsequent action between the same parties for the same cause of action.

On this point we need only refer to the language of the Supreme Court of the United States in Gould *vs.* Evansville & C. R. R. Co. (91 U. S. R., 526), where it was held: (1.) That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record, and the rule is that facts thus established can never after be contested between the same parties or those in privity with them. (2.) That if judgment is rendered for the defendant on demurrer to the declaration or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration, for the reason that the judgment upon such a demurrer de-

termines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless.

36 Guided by these views, we hold that the judgment of the supreme court of the District is a bar to the first count of the petition in this case.

Finally, the very claim set up in that count was, as stated in finding XV, presented to the board of audit and was by that board examined and disallowed. The act giving us jurisdiction of claims against the District of Columbia expressly declares "that no claim shall be presented to or be considered by the Court of Claims under the provisions of this act which was rejected by the board of audit." (21 Stat. L., 284, ch. 243, § 8; 1 Suppl. Rev. Stat., 564.) In our opinion the defense might have thrown this case out of this Court under that provision alone; but it was, doubtless, better that the whole facts should be judicially found and the law upon them declared, so as to make a recorded finality of the matter.

The judgment of the Court is that the claimant's petition be dismissed.

37 *Judgment.*

In the Court of Claims.

TALMADGE E. BROWN
*vs.*
THE DISTRICT OF COLUMBIA. } 145.

At a Court of Claims held in the city of Washington on the 14th day of April, A. D. 1884, judgment was ordered to be entered up as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge, and decree that the claimant's petition be dismissed.

38 *Appeal.*

In the Court of Claims.

TALMADGE E. BROWN
*v.*
THE DISTRICT OF COLUMBIA. } No. 145.

And now comes the claimant, by his attorneys, Messrs. C. C. Cole and Fillmore Beall, and moves the Court for the allowance of an appeal from the judgment rendered in the above-entiled cause on the 14th day of April to the Supreme Court of the United States.

C. C. COLE,
FILLMORE BEALL,
*Att'ys for Claimant.*

Allowed:
C. D. DRAKE, *C. J.*

39 *Certificate.*

In the Court of Claims.

TALMADGE E. BROWN
*vs.*
THE DISTRICT OF COLUMBIA. } No. 145.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and the conclusion of law thereon, of the final judgment in the cause, and of the appeal allowed therein.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Washington, this 27th day of June, 1884.

[Seal of Court of Claims.]

ARCHIBALD HOPKINS,
*Chief Clerk Court of Claims.*

Endorsed on cover: Court of Claims. No. 224. Talmadge E. Brown, appellant, *vs.* The District of Columbia. Filed May 4, 1885.

4-5-79

Office Supreme Court U. S.
FILED.
APR 7 1888
JAMES H. McKENNEY.
CLERK.

—IN THE—

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1887.

---

TALMADGE E. BROWN, *Appellant.*

*vs.*

THE DISTRICT OF COLUMBIA.

---

## ARGUMENT OF APPELLANT.

---

C. C. COLE, Des Moines, Iowa,

FILLMORE BEALL, Washington, D. C.

*Attorneys for Appellant.*

STICKLEY & HIGGINS' PRESS, DES MOINES.

39 *Certificate.*

In the Court of Claims.

TALMADGE E. BROWN
*vs.*
THE DISTRICT OF COLUMBIA. } No. 145.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and the conclusion of law thereon, of the final judgment in the cause, and of the appeal allowed therein.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Washington, this 27th day of June, 1884.

[Seal of Court of Claims.]

ARCHIBALD HOPKINS,
*Chief Clerk Court of Claims.*

Endorsed on cover: Court of Claims. No. 224. Talmadge E. Brown, appellant, *vs.* The District of Columbia. Filed May 4, 1885.

7-5-79

Office Supreme Court U. S.
FILED.
APR 7 1888
JAMES H. McKENNEY,
CLERK.

—IN THE—

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1887.

---

TALMADGE E. BROWN, *Appellant.*

*vs.*

THE DISTRICT OF COLUMBIA.

---

## ARGUMENT OF APPELLANT.

---

C. C. COLE, Des Moines, Iowa,

FILLMORE BEALL, Washington, D. C.

*Attorneys for Appellant.*

STICKLEY & HIGGINS' PRESS, DES MOINES.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1887. NO. 224.

---

TALMADGE E. BROWN, *Appellant*,
*vs.*
THE DISTRICT OF COLUMBIA.
} *Appeal from the Court of Claims.*

---

## ARGUMENT FOR APPELLANT.

The plaintiff as partner in and assignee of the Ballard Pavement Company, sues to recover damages for breach of contract for paving, made by the defendant with said company, and also for unpaid balance due for paving actually done. The Court of Claims dismissed the plaintiff's petition, and he appeals to this court. See case reported in 19th Ct. of Claims 445.

I.

In December, 1872, the Ballard Pavement Company made a written proposal to the Board of Public Works to pave, upon certain con-

ditions, 75,000 square yards of pavement, and to do certain grading, etc. On December 10, 1872, this proposition, in its very language, was accepted by the board, by letter of that date, addressed to the Pavement Company, signed by the secretary of the board.

Afterwards at several successive dates the board of public works designated certain streets whereon the plaintiff's company should do parts of the pavement contracted for. After the work was done under the several designations, the board required the pavement company to sign certain other printed contracts before it would order the measurement of the work done under such designations, or order the issuance of certificates therefor. Accordingly such authorized form of contract was signed, the same being in its terms like the proposition made to and accepted by the board, and also specifying the streets whereon the work was to be done, but was in no otherwise different from said proposal. So that the proposal and designations of streets were in exact accord with the subsequent formal contracts, none of which were signed before much of the work was done under the designation, and some not until after the completion of such work. The Pavement Company did substantially one-half the paving contracted for by the proposition aforesaid and its acceptance, and were then refused permission to do any other work. The company had provided material for doing all the 75,000 square yards, which material by reason of the refusal to permit the company to do the work was substantially lost to the company. Upon this branch of the appellant's case we submit:

1. That the contract sued upon, it being a formal proposition in writing, and an acceptance thereof in writing signed by the secretary of the board, whose authority to sign the same, is not denied, and whose genuine signature thereto is admitted, constitute a valid contract, binding upon the parties. See:—

*Moore & Boice vs. U. S.*, 1 Ct. of Claims, 90.
*Adams vs. U. S.*, 1 Ct. of Claims, 192.
*Driscoll vs. U. S.*, 13 Ct. of Claims, 15–36-7.
*Garfielde vs. U. S.*, 11 Ct. of Claims, 332–592.
*Cobb vs. U. S.*, 7 Ct. of Claims, 473.
*Neale et. al. vs. U. S.*, 14 Ct. of Claims, 280.
*Garfielde vs. U. S.*, 93 U. S. Rep., 242.

*Taylor vs. The M. F. Fire Insurance Co.*, 9 How., 390.
*Hamilton vs. Lycoming Insurance Co.*, 5 Penn. St., 339. and cases cited.
*Mactiers vs. Frith*, 6 Wend, 103.
*Pratt vs. Hudson River R. R. Co.*, 21 N. Y., 305.
*Bronson vs. Chappell*, 12 Wall, 681.

2. But if such contract was not originally binding on the District of Columbia because of its form, or other reason, it became valid and binding by reason of the fact that it was afterwards recognized by the parties, was performed in part by the defendant, in designating the streets whereon the work should be done, by approving and accepting said work, and by the part performance of the contract on the part of the pavement company. The fact that the pavement company were required, before their work under their original contract would be measured or certificates issued to them therefor, to sign more formal contracts like those which were signed by contractors who originally contracted for a specific street, does not at all negative the idea of part performance. Such part performance made the contracts binding, and entitles the appellant to recover. See:—

Brown on Statute of Frauds, s. 447–448 and notes.
Fremont on State of Frauds, s. 461–476.
Lindsley on Statute of Frauds, s. 359-365.
Danolds on Statute of Frauds, s. 65.
Gibbons on Statute of Frauds, s. 416–423.
*Neale et. al. vs. U. S.*, 14 Court of Claims, 280.

3. Said original contract, even if regarded as informal and insufficient of itself, (which we deny,) yet it would become valid by reason of the recognition of such contracts and the ratification thereof by Congress:—

Act of June 20, 1874, 18th Stat., p. 116.
Act of June 11, 1878, 20th Stat., 102.
Act of June 16, 1880, 20th Stat., p. 286.
Joint Resolution of Dec. 21, 1874. 18th Stat., p. 223.
*Neitzey vs. District of Columbia*, 19 Ct. of Claims.

We submit that the multiplied negative findings of fact by the

court, which are remarkable efforts to create a basis out of nothing, whereon to rest a denial of appellant's claim, cannot be sufficient to defeat the basis of fact, whereon it rests, under the affirmative facts found, and the authorities we have cited.

II.

The plaintiff sets up his cause of action in four counts; the first count being upon the coutract or proposition, and acceptance hereinbefore stated. The second count being for work done, and the averment that only one-half thereof had been paid for. The third count sets up the doing of the work, and the issuance of auditor's certificates therefor, under such circumstances as constituted the company an agent for the district to dispose of the certificates at their value, which was fifty per cent of their face. The fourth count sets up the doing of the work, the issuance and delivery to the pavement company of auditor's certificates, which were chattels, and a commodity only, and which were worth fifty per cent of their face allowance. The court of claims found in its twelfth finding that "such certificates were in the city of Washington and elsewhere a recognized comodity for sale with a value changing from time to time," but averaging about fifty per cent of their face value.

By the supplemental contracts which were required to be issued before the board would authorize the measurement of the work done under the designations pursuant to the original contract, or authorize the issuance of auditor's certificates, it was expressly agreed that the pavement company "shall punctually pay the workmen who shall be employed by him (it) on work under this contract in cash current, and not in what is denominated store pay or orders; and that he will from time to time and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required" (Record, pp. 16–17). In order to make the payment thus required, these auditor's certificates were sold on the market, the pavement company being otherwise unable to comply with its contract in the particular above quoted. Under the findings of fact, which are not numerous, and to which we call the attention of the court in detail, we submit:

1. That as a matter of law the receipt by the Ballard Pavement

Company of auditor's certificates of indebtedness, under the circumstanstances they were received as shown by the findings of fact, were not payment, but merely the delivery of chattels or a commodity to be accounted for by the pavement company at their reasonable market value, and the district was and is only entitled to credit for such value, or the amount which could have been realized therefor by the use of reasonable diligence.

*Ballrd vs. Mandall*, 2 McArthur 351.
*City of Memphis vs. Brown*, 20 Wallace 289.
*Cowdrey vs. Vandenberg*, 101 U. S., 572.
*Callanan vs. Brown*, 31 Iowa, 335.

2. Even if the District of Columbia has since said time paid said certificates in full of their face the same being non-negotiable instruments, such payment cannot confer any rights upon the district as against this appellant.

*Cowdrey vs. Vandenburg*, 101 U. S., 572.
*Ballard vs. Mandall*, 2 McArthur, 351.

III.

The defendant, the District of Columbia, set up as one of its defenses a former adjudication. In support of this defense the district introduced in evidence a copy of the amended petition filed by the plaintiff and his partners, constituting the Ballard Pavement Company, in the supreme court of the District of Columbia. The district filed a general demurrer to the petition, which was sustained, and the petition dismissed. No further action in that court was ever had thereon (see fact 14, page 21). This defense is found by the opinion in the court of claims, good and sufficient.

It is not necessary for the appellant to controvert the proposition whereon the opinion of Chief Justice Drake is manifestly founded, to-wit, that where a demurrer is sustained to a petition, and judgment is rendered thereon, that such decision upon demurrer constitutes *res. adjudicata* as to the facts, well or properly pleaded in said petition. We say we may well concede this rule of law, because here, in the petition in this case are two material, distinct and substantive facts, alleged in addition to the allegations contained in the petition in the supreme court of the District of Columbia, to-wit:

1. That the said original contract was afterwards recognized by both parties, and was in part performed by the plaintiff, and payments thereunder made by the defendant. 2. That the contract had been ratified and confirmed by the several acts and resolutions of congress referred to in the petition.

If the supreme court of the District sustained the demurrer upon the ground as shown by the opinion in the Court of Claims in this case, to wit: that the original contract was not in such form as to constitute a formal written contract, then the additional fact averred in the petition in this case that said contract had been partly performed by both parties thereto, would be a complete answer to that deficiency; or if it was assumed that there was no authority conferred upon the District by Congress to make such contract, the subsequent ratification thereof by Congress would make the same valid and binding, We need not refer to authorities, additional to those hereinbefore cited, to vindicate this position.

## IV.

Another defense specially pleaded and relied upon by the District in the Court of Claims was that the claim whereon this action is founded was *rejected* by the board of audit (Fact 15, page 23).

In this case, however, no evidence was ever introduced as to the claim before the board of audit, for that board determined that since the claim presented to it by the Ballard Pavement Company was simply for damages for breach of contract in the sum of $75,000, that the board of audit had no jurisdiction of it, and therefore did not allow it. It was not *rejected*—that board simply did *not allow it.* The Act of June 16, 1880, requires that in order to defeat the jurisdiction of the court of claims the board of audit must have *rejected* the claim presented. This was never done. This claim now sued upon is for payment of fifty per cent of the value of the work actually done, no part of which was ever paid, and also for damages for failure to designate and award other work under the original contract, as to which latter claim the board of audit had no jurisdiction, and the other was not presented to the board at all. This surely was not a rejection of the claim sued upon, within the meaning of the Act approved June 16, 1880.

V.

The claimant having shown a valid contract and offer to perform on his part, and shown both ability and readiness to perform the same, and a refusal on the part of the defendant to provide for and allow such a performance, is entitled to recover the difference between the contract price and what it would have cost the claimant to have performed the work, which is one dollar and fifty cents per square yard for 37.850½ square yards, or $56,775.75.

The proper measure of damages in cases of this kind is the difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract.

*Speed vs. U. S.*, 7th Court of Claims 93.

We submit to this court that the plaintiff in this case is entitled to recover damages for the full award and work under the original contract, and also the difference between the amount of work actually done and not paid for in materials, to wit, $139,569.85, one-half of which was paid in the "commodity" of Auditor's certificates, then of the value of one-half thereof, leaving due to the appellant for the work actually done the sum of $69,784.92½, for which, together with the difference between the cost of laying the pavement and the contract price, the appellant should have judgment.

Respectfully Submitted,

C. C. COLE, Des Moines, Iowa,

FILLMORE BEALL, Washington, D. C.,

*Attorneys for Claimant.*

7-5-79

7-5-79

# In the Supreme Court of the United States.

OCTOBER TERM, 1887.

TALMADGE E. BROWN, APPELLANT,
*v.*
THE DISTRICT OF COLUMBIA. } No. 224.

*APPEAL FROM THE COURT OF CLAIMS.*

**BRIEF FOR APPELLEE.**

# In the Supreme Court of the United States.

OCTOBER TERM, 1887.

---

TALMADGE E. BROWN, APPELLANT,
*v.*
THE DISTRICT OF COLUMBIA. } No. 224.

---

*APPEAL FROM THE COURT OF CLAIMS.*

---

## BRIEF FOR APPELLEE.

The District of Columbia, appellee, desiring to add nothing to the able and exhaustive opinion of the late chief justice of the Court of Claims, printed in the record (Tr., pp., 25–31), respectfully asks leave to submit this cause upon that opinion.

A. H. GARLAND,
*Attorney-General.*
ROBERT A. HOWARD,
*Assistant Attorney-General.*

19575

27-589

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1887.**

No. 277.

FANNIE B. ALLEN, APPELLANT,

*vs.*

HENRY F. GILLETTE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

**FILED SEPTEMBER 1, 1885.**

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1887.

## No. 277.

---

FANNIE B. ALLEN, APPELLANT,

*vs.*

HENRY F. GILLETTE.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Bill of complaint | 2 | 1 |
| Exhibit A—Statement of lands pertaining to the estate of James Morgan, deceased | 21 | 9 |
| Subpœna | 23 | 10 |
| Marshal's return | 24 | 11 |
| Appearance for defendant | 25 | 11 |
| Demurrer to bill | 26 | 11 |
| Affidavit of M. F. Mott | 31 | 14 |
| Note of filing demurrer | 33 | 15 |
| Order setting demurrer for hearing | 33 | 15 |
| Order granting leave to file amended bill | 34 | 15 |
| Amendments to bill | 34 | 15 |
| Exhibit B—Petition, will, proof, and order in matter of estate of James Morgan, (deceased) | 36 | 17 |
| Submission of demurrer | 43 | 20 |
| Order overruling demurrer | 43 | 20 |
| Answer | 44 | 20 |
| Exhibit No. 1—Statement of amounts due by Morgan's estate at his death and paid by his executors | 86 | 38 |
| No. 2—Statement showing sales of land of the estate of Morgan | 87 | 40 |


---

JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 17, 1887.

& that the said Ball only approved & concurred in the acts of the said Gillett so as to give legal force and effect as the joint performance of said executors, whereby the said Gillett became familiar with all the matters and details of said estate, and was thereby fully informed and advised as to the character and value of the interest of your oratrix therein.

5th. Your oratrix is further informed, believes, & so avers that the indebtedness of said estate was small in comparison with the value of said estate, & that the same was of comparative
4 easy adjustment, and if said executors had promptly and efficiently discharged their duties said estate could have been duly administered and partitioned, so as to have made the interest of your oratrix therein available to her long before the 13th day of June, A. D. 1872, all of which said executors failed to do, and by so failing your oratrix was, by her family necessities and the importunities of her husband, as well as by the suggestions of the said Gillett, induced to mortgage her interest in certain lands belonging to said estate & which are described in Exhibit A, attached to this bill of complaint, which is made a part hereof, by which the said Gillett became the purchaser of her said interest in said lands, as will be more fully hereinafter shown.

6th. That the father of your oratrix was the son of the said James Morgan deceased, and that her said father departed this life during the year 1865, leaving your oratrix & five other children, all of whom were infants of tender age, together with their widowed mother, without any means of support, and dependent upon their said grandfather, who was then very aged and infirm, and with whom they resided up to the time of his said death; during which time your oratrix & her said mother & other children were all tenderly cared for & supported by their said grandfather, all of whom, together with their cousin, Ellen Lee, were the principal devisees under his said will.

5 7th. That shortly after the death of said grandfather, to wit, about the month of June, 1866, when your oratrix was about seventeen years of age, she intermarried with one Harry L. Allan, who had no other means of supporting himself & wife except by his labors as clerk, book-keeper, or otherwise by his personal labors; that your oratrix hoped and believed, at the time of said marriage, that she would have been able to obtain from said executors, as she thought she had a right to, the interest which was bequeathed to her by her grandfather as aforesaid, and that for more than six years thereafter did your oratrix anxiously await and expect said executors to administer said estate, so that your oratrix could get her interest in the same partitioned to her, or at least a portion of the same & sufficient to meet her then current family necessities, which were then pressing her said husband to maintain your oratrix & their three little children, the fruits of said marriage; that your oratrix' said husband became unfortunate in business and was not able to procure sufficient employment to meet necessary family expenses, as well as being afflicted with sore eyes and about to lose his sight, when about the 13th day of June, A. D. 1872, your oratrix,

at the instance of the said husband and in company with him, called on the said Gillett, who was then the acting and managing executor of said estate, and who was familiar with the condition and resources of the same, and as such had then had possession
6 and control of the same for more than six years, as well as being familiar with the pressing financial necessities of your oratrix & husband, and did then and there request and entreat him, the said Gillett, to let your oratrix have her portion of said estate or to arrange in some way to make the same available, so as to relieve your oratrix & husband from the then pressing wants of themselves & family, but the said Gillett did then and there refuse said request and to take any action whatever to make such interest available, except the said Gillett did then and there suggest and advise that your oratrix & husband could obtain money on her said interest by mortgaging said interest in said estate & did then and there proffer his assistance to negotiate for your oratrix and husband, & in that way and for that purpose the said Gillett did, on the said 13th day of June, A. D. 1872, assist your oratrix & her said husband to get the Banking & Insurance Company of Galveston to discount the joint note of your oratrix & husband, which note was jointly executed by your oratrix and her said husband for the sum of twelve hundred dollars, payable six months from date, with twelve per ct. interest. Your oratrix does not now recollect the discount paid said banking company for discounting said note, nor does your oratrix recollect the amount of money received from said
7 banking company for said note, but believes it was considerably less than the face value of said note & perhaps not more than one thousand dollars, but whatever it was it was paid by said banking company to her said husband, who used and expended for the use and benefit of himself & well as for oratrix & family.

8th. That at the time of the execution of said note as aforesaid, & before the same was discounted by said banking company, there was executed what your oratrix understood to be a mortgage or deed of trust on all of her interest in the lands contained & described in said Exhibit A to secure the payment of said note, which mortgage or deed of trust was made at the suggestion of the said Gillett as the only way your oratrix & her said husband could obtain any money out of said interest, all of which was negotiated and agreed upon in the negotiation with said banking company, through the assistance of the said Gillett as aforesaid; that at the time said negotiation was made the said Gillett was familiar with the financial necessities of your oratrix & family, as well as the poor business capacity of her said husband, and as such the said Gillett well knew that neither your oratrix nor her said husband had any means or other resources or any other prospect whatever of paying said note at maturity except by making her said interest in said estate
8 available for that purpose; and your oratrix avers that the said Gillett did, before and at the time of making said negotiation & before the making of said mortgage or deed of trust, suggest & promise your oratrix that he would do the best he could in protecting her interest in said estate, and that he would make her

interest in said estate available so as to pay off said note and thereby prevent the sale of her said interest under said mortgage or deed of trust, and the said Gillett did thereby induce your oratrix to believe that there would be no danger of her interest being sold to pay said mortgage; that if your oratrix had believed that the said Gillett would have failed to protect her interest, as he led her to believe, as aforesaid, she would not have consented to said negotiations and would not have signed said mortgage or deed of trust, but about a month after your oratrix had signed said mortgage or deed of trust said Gillett informed your oratrix by letter that he was sorry that she had made said mortgage & that unless your oratrix & her husband would pay said note at maturity that he feared that her interest in said lands would be sold under said mortgage or deed of trust to pay said note; that this was the first knowledge or any intimation of the sort that said Gillett in any way disapproved of the making of said mortgage or deed of trust, which was a great surprise and disappointment to your oratrix, but your oratrix says
9 that neither she nor her husband had any way of paying said note at maturity, which the said Gillett well knew as aforesaid, and that said Gillett wholly failed and refused to protect the said interest of your oratrix by making her interest in said estate available for that purpose, as he had led your oratrix to believe he would do as aforesaid, and he, the said Gillett, so refusing and wholly failing to pay said note, did, on the 15th day of January, A. D. 1873, permit said mortgage or deed of trust to be foreclosed by sale thereunder, at which sale the said Gillett became the purchaser of the same for the sum of fourteen hundred dollars.

9th. Your oratrix avers that at the time of the maturity of said note said executors had been in the possession & control of said estate for nearly seven years, and that your oratrix is informed & so avers that during said time they had disposed of a large amount of the property belonging to said estate, none of the proceeds of which was paid to your oratrix, nor did she during said time ever receive any of the benefits of said estate, nor did her mother or any of said children who were devisees under said will as aforesaid, except some comparative small sums that were paid by said executors to the said mother shortly after the death of the said grandfather for the current support of herself & children, the exact amounts of which
10 your oratrix is not advised; that said mother departed this life about the month of April, 1867, after which said executors failed and refused to make any provision for the support and maintenance of any said children, all of whom were infants of tender age, except some small amounts from time to time to pay for the education of some two or three of said children, not exceeding, as your oratrix is informed and believes, in all about six hundred dollars, and, as said executors well knew, had no other means for their support & maintenance except what was coming to them from their said grandfather's estate then in the hands of said executors, until said estate was partitioned, which your oratrix is informed was made in December, A. D. 1877, by a decree of the district court of the said county of Harris in a certain suit instituted by parties

interested in said estate against said executors for that purpose; and your oratrix —, from the best information she has received, & so believes and charges, that said executors nor either of them, during the said six years, nor for a long time thereafter, to wit, during the year A. D. 1877, when said executors were forced by said suit, ever made any showing whatever to any of said devisees under said will as to the value or condition of said estate or how or in what way the same was being by them administered, and then only as they were compelled to do by the institution of said suit; and especially does your
11 oratrix aver that said executors failed in any manner to account during said six years or any time thereafter to your oratrix for her said interest in said estate or to in any way inform her of the probable value of the same or give her any other information as would enable your oratrix to understand the amount and value of her said interest in said estate, and that said executors, if they had performed their duty in the premises, had ample time within said six years to have fully administered said estate and partitioned the same among the devisees entitled thereto before the maturity of said note or foreclosure of said mortgage or deed of trust in Jan'y, 1873, whereby your oratrix could have made her interest in the same available for the payment of said note and thereby prevented the foreclosure and sale under said mortgage or deed of trust and further relieved her distress in the premises.

10th. Your oratrix is informed and believes and so charges that at & before the 15th day of Jan'ry, 1872, the date of said purchase by Gillett, *that* your oratrix' interest in said lands was worth at least three times the value that said Gillett gave for the same at said sale, in its undivided condition, and if said estate had thus been properly administered & said interest had been duly parti-
12 tioned the same would have been worth a great deal more at said time, but your oratrix charges that the said Gillett was, from his opportunities as the active executor of said estate as aforesaid, about the only person who was familiar with the value of said interest, and who had failed to inform your oratrix of the same, and who had failed to make any exhibit of the condition of said estate, and by so withholding such information and by failing to administer the same within a reasonable time, to wit, nearly seven years, the time which said executors had full possession & control of said estate before the purchase of your oratrix' interest by the said Gillet as aforesaid, whereby he, the said Gillett, did have, take, & exercise undue advantage over your oratrix and any other person in bidding in said interest and becoming the purchaser thereof at said sale and thereby obtained an unconscionsable advantage over your oratrix & obtained said interest for much less than the same was in truth & in fact worth at the time of said sale.

11th. That shortly after the purchase of said interest at said sale by the said Gillett, to wit, about the month of April or May, A. D. 1873, your oratrix had an opportunity of selling her interest in said lands for seven thousand dollars, provided she could redeem
13 from the said Gillett, who became the purchaser at said sale as aforesaid; whereupon your oratrix applied to the said

Gillett to redeem said interest purchased as aforesaid by paying him the amount of said purchase and interest, & the said Gillett did then and there refuse to entertain any proposition from your oratrix to redeem said lands, giving as his reason for so refusing to the effect that he did not want to be bothered with any more new parties purchasing interest in said estate as he had already been annoyed by one who had purchased or — about to purchase the interest of one of the other devisees under said will.

12th. That in the year A. D. 1874 your oratrix came to Kentucky, where she is now living, for the purpose of visiting her grandmother on her mother's side, with the intention of returning to Texas when her health was restored, which was then bad; that in A. D. 1875 her said husband came to Kentucky and remained with your oratrix until about the latter part of said year, when said husband abandoned your oratrix, and leaving her with her three little children without any means of support, and that the said husband never from that time contributed or in any way assisted to support your oratrix and said children, or either of them, up to the time
14 of his death, which occurred about the month of February of the present year, A. D. 1883; that said husband, from and about the said 13th day of June, A. D. 1872, up to the time of his abandoning your oratrix & children, as aforesaid, was most of said time without employment, & contributed but little, if any, to the support of your oratrix & said children; that your oratrix, from the time of said marriage with said husband up to the time of said abandonment, entertained for him the most devoted affection, yielding to his wishes, & controlled by his suggestions and advice in all matters pertaining to her business affairs; and so doing did, at the instance and request of said husband, on the said 13th day of June, 1872, execute said note and mortgage, all of which was then well known to the said Gillett.

13th. That your oratrix is informed and so avers that about the month of December, A. D. 1877, there were certain proceedings in the suit hereinbefore referred to, then pending — the said district court of Harris county, by which the most of the said estate of the said grandfather, James Morgan, deceased, was partitioned, by which was set apart to the said Gillett, as the purchaser of the interest of your oratrix, as aforesaid, the following-described lands, viz:

937 acres out of the Henry White $\frac{1}{4}$ of a league, in Liberty county.

700 acres, being an undivided interest in the James Yeoman's $\frac{1}{3}$ of a league, in Erath county.

15 2,258 acres in the Benjamin Lanier league, in Tyler county.

2,302$\frac{1}{2}$ acres, being an undivided half interest in the Jacob Winfry league & labor on the west bank of Nueces river, in Edwards & Crockett counties.

320 acres granted to Thomas R. Edmonson in Bexar county.

442$\frac{1}{2}$ acres out the Richard Powell $\frac{1}{3}$ of a league, in Grimes county.

107 acres out of W. P. Harris league, in Harris county, on Galveston Bay.

22 acres, being lot No. 11, in Johnson Hunter league, in Harris county.
21½ " " 12 " " "
100 " " 17 " " "
43½ " out of the Lucy Pearsall grant, in Grimes county, the same making a total of 7,234 acres of land, described as aforesaid, & situated in the said State of Texas, the same being reasonably worth the sum of ten thousand dollars, according to the best information and belief of oratrix, all of which more fully appears by said proceedings, & which will be shown upon the trial hereof, and which said lands are now claimed by the said Gillett as purchaser from your oratrix under said mortgage or deed of trust.

14th. That your oratrix had no knowledge of the said proceeding in the district court of Harris county until some time after the same were had, to wit, about the year A. D. 1878, when she was informed of the same by the said Gillett, who then offered to
16 let your oratrix redeem said land by paying him the amount of said purchase-money, with interest; that if it appears from such proceedings in said court that your oratrix was a party thereto, your oratrix avers that she had no knowledge of the same, and that the same was wholly unauthorized by her; that at the time said Gillett made said offer to your oratrix to recover said lands, as aforesaid, she was living in Kentucky, where she now resides, and was then, as now, in poor & needy circumstances & had no possible way of raising the necessary money to redeem said land; that the said opportunity which she had in Texas in 1873 to sell said land had long since past; that she did not know of anybody then in Kentucky who had any knowledge of said land or its value from whom she could raise money, and she was too poor to go to Texas to look into the matter of financiering to redeem the same, all of which your oratrix believes were at the time well known to the said Gillett.

15th. That from and about the time of the purchase of the said interest in said lands of your oratrix by said Gillett at said sale under said mortgage or deed of trust, on the 15th day of January, 1873, as aforesaid, to the present time, your said oratrix has
17 been a victim to misfortune and greatly depressed by poverty, with which she has had to struggle to support & maintain herself and three little children during said time, and especially since she came to Kentucky in 1874, as aforesaid, has she had no means or opportunity of ascertaining whether she had any lawful claim against said Gillett for the recovery from him of her said interest in said lands as purchased by him as aforesaid; that she always thought that the said Gillett should have protected her interest & not have permitted the same to have been sold as aforesaid, but your oratrix was not aware of any right in law or equity by which she could recover her interest in said lands from the said Gillett; that she has always been too poor to pay the expense of returning to Texas to look after and investigate whether or not she had any rights in the premises, and that she has been too poor to employ a lawyer or any other person to investigate her right, if any,

in the premises, though she has always desired to do so, & for that purpose she has conversed with lawyers & other persons in Kentucky, but has never been able to get any one to give her any information or advice as to her right to recover in the premises until about two weeks ago, when your oratrix met, in Kentucky, John T. Brady, a lawyer of Houston, Texas, who has been recently
18 employed by her sisters, who also reside in Kentucky, to litigate rights growing out of their interest in said estate of said deceased grandfather, James Morgan, and your oratrix proceeded to state to said Brady in detail the facts and circumstances upon which this suit is now brought and elaborated herein, whereupon the said Brady informed your oratrix to the effect that she had a good cause of action against the said Gillett to redeem & recover of him her said interest in said lands and said estate. Your oratrix avers that she did not know that she had any cause of action against the said Gillett to recover her said interest in said lands until she was informed & advised by the said Brady to the effect as above stated; that in meeting & consulting with said Brady as aforesaid your oratrix avers it was the first opportunity that she ever had of meeting and conversing fully with any person familiar with the laws of Texas since about the beginning of the year 1874, when she left Texas for Kentucky aforesaid; that about the time of making said negotiation & mortgage & the sale & purchase by Gillett, & before your oratrix left Texas for Kentucky as aforesaid, your oratrix entirely relied on her said husband to transact her business & to consult and advise in all matters pertaining to her legal rights, and particularly in all matters did so act as related to her
19 transactions with said Gillett as aforesaid; that said husband and the said Gillett seemed on very intimate and confidential terms, and that said husband did not attempt, as far as your oratrix is informed & believes, ever to question the legality of any act of said Gillett during said time.

16th. That your oratrix is informed, and so charges, that said executors have not yet fully administered & settled up said estate, and that there was other property belonging to said estate, in which your oratrix had an interest in, which was not covered by said mortgage or deed of trust, & which was not purchased by said Gillett, & which went into the possession of said executors or which said executors were entitled to possession thereof, the amount and value of which your oratrix is not advised.

Your oratrix is further informed, & so charges, that said executors have not made an exhibit showing fully the exact amount & kind & value of property that came into their hands belonging to said estate, nor any exhibit showing in detail how the same has been administered or what disposition has been made of the same, concerning all of which your oratrix is entitled to discovery.

The premises considered, your oratrix prays that she be allowed to redeem said land by paying said Gillett said purchase-
20 money, with interest, & that the said Gillett be required to answer fully under oath each and every one of the allegations and averments contained and charged herein as though specially

interrogated in reference thereunto, and also show what portion, if any, he has sold; if so, at what price, & name of purchaser or purchasers, the condition and value of said lands, & what proceeds or revenues he has received from the same or any part thereof, and that he account for all and singular the money or other property or effects which he may have received on account of said lands.

And your oratrix further prays for all the general and special relief to which she may show herself entitled against said H. F. Gillett, and in duty bound she will ever pray.

Therefore will your honors grant your oratrix the writ of subpœna, issuing out of and under the seal of this court, to be directed to said defendant, H. F. Gillett, commanding him, by a certain day & under a certain penalty therein inserted, to appear before your hons. in the circuit court of the United States in and for the eastern district of Texas, at Galveston, and then and there answer the premises & abide the order and decree of the court.

FANNY B. ALLAN.

BRADY & RING, *Solicitors for Plaintiff.*

21 THE STATE OF KENTUCKY, *County of Franklin:*

Personally appeared before me Fannie B. Allan, who is personally known to me to be the identical person who signed the aforegoing bill of complaint, and being duly sworn by me says that she has read said bill of complaint and that the allegations contained therein as stated within her own knowledge are true, and such allegations as stated therein upon information she believes to be true.

FANNY B. ALLAN.

Subscribed and sworn to before me by Fanny B. Allen this 2nd day of October, 1883.

[SEAL.]

FRANK CHINN,
*Notary Public for Franklin Co., Ky.*

EXHIBIT A. Referred to in the Afor-going Petition.

*Lands in Texas Pertaining to the Estate of James Morgan, Deceased.*

The following tracts are situated in Harris county:

1,100 acres out of the Johnson Hunter league.
472 " " " "
88½ " part of 23 labors granted to David Middleton.
137 " out of grant to Wm. P. Harris.
442½ acres out of grant to R. Piercall.
22 3,858 " " " to Edward King.
800 " " " to Lucy Piercall.

The following tracts are situated in Liberty county:

1,964 acres out of league granted to Stephen Nicholson.
937 " " ¼ " " Henry White.
3,941 " " " " Spencer Kirkland.
1,107 " " " " Meredith Duncan.
1,989 " " " " J. R. Faulk.
1,600 " " " " Christian Smith.

The following tracts are situated in Polk county:

2,314 acres out of league granted to Elizabeth Johnson.
3,239 " " " " Wm. Price.
3,059 " " " " Joseph Scott.

The following tracts are in Tyler county:

4,028 acres out of the J. J. Blackman league.
3,982 " " Burrel " "
2,078 " " B. Lanier grant.
1,654 " " James B. Wood league.
1,850 " " Charles Felder.

The following tracts are in Bexar county:

1,476 acres granted to John Glover.
640 " " " David Wynn.
960 " " " David Jones.
2,302½ " " " Jacob Winfrey.

23 Also 700 acres in Erath county out of the James Yeoman grant of ⅓ league; also numbers 957 and 958 of Toby script, amounting to 1,280 acres.

The foregoing bill of complaint, with Exhibit A thereto annexed, is endorsed: "Ch., 173. Fannie B. Allan *v.* Henry F. Gillett. Bill of complaint. Filed Oct. 15, 1883. C. Dart, clerk."

*Subpœna Issued Oct.* 16, 1883.

UNITED STATES OF AMERICA:

Circuit Court, Fifth Circuit and Eastern District of Texas.

The President of the United States of America to Henry F. Gillett, Greeting:

You are hereby commanded to appear personally before the honorable circuit court of the United States for the eastern district of Texas, in the fifth circuit, at a court to be holden at the city of Galveston, in and for said circuit, on the first Monday of December next, or whensoever the said court shall be there, to answer a bill exhibited against you by Fannie B. Allan, and to do further and receive what the said court shall have considered in that behalf. And this *that* you are not to omit under the penalty of two hundred and fifty dollars.

24 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, at the city of Galveston, this 16th day of October, eighteen hundred and eighty-three, and of the Independence of the United States of America the 108th year.

[SEAL.]

C. DART,
*Clerk U. S. Circuit Court, Eastern District of Texas, at Galveston.*

The defendant, Henry F. Gillett, is required to enter his appearance in the above suit in the clerk's office on or before the first Monday of December next; otherwise the bill will be taken as confessed.

C. DART,
*Clerk U. S. Circuit Court, Eastern District of Texas, at Galveston.*

*Marshal's Return Endorsed on Subpœna.*

Came to hand the 30th day of Oct., 1883, and I executed the same the first day of November, 1883, by delivering a true copy of this writ to Mrs. L. E. Duke, a person over 16 y'rs old, at the abode of Henry F. Gillett, in Harris county, Texas.

TIM. FINN, *U. D. M.*

25 The foregoing subpœna endorsed as follows: Ch. No. 173. Fannie B. Allen *v.* Henry F. Gillett. Subpœna in chancery. Issued Oct. 16th, 1883. Returnable December rules, 1883. C. Dart, clerk. Returned and filed fifth day of November, A. D. 1883.

*Precipe to Enter Appearance. Filed Dec'r* 1, '83.

OFFICE OF BALLINGER, MOTT & TERRY,
ATTORNEYS AND COUNSELLORS AT LAW,
125 POST-OFFICE STREET,
GALVESTON, *Dec.* 1, 1883.

C. Dart, Esq., clerk U. S. cir. c't, Galveston.

DEAR SIR: In cause No. 173 on the chancery docket, Fannie D. Allan *v.* Henry F. Gillett, please enter appearance for the defendant by us, as solicitors for him, on the rule day in December.

Also, at your convenience, please make us out a copy of the bill.

Truly yours,

BALLINGER, MOTT & TERRY,
*Solicitors for Defendant.*

Endorsements: Ch., 173. Fannie D. Allen *v.* Henry F.
26 Gillett. Appearance of def't. Filed Dec. 1, 1883. C. Dart, clerk.

*From Rules. Appearance of Def't.*

Circuit Court of the United States, Eastern District of Texas.

FANNIE B. ALLAN, Complainant,
*against*
HENRY F. GILLETT, Defendant. } Equity. No. 173.

And now, on this the 1st day of December, 1883, comes the defendant, by his solicitors, Ballinger, Mott & Terry, and enters his appearance in this cause to the complainant's bill filed against him herein as of December rules, 1883.

Attest:

C. DART,
*Clerk U. S. Circ't Court, E. D. T., G.*

*Demurrer to Bill. Filed Jan'ry 7, 1884.*

Circuit Court of the United States, Eastern District of Texas. In Equity. Ch., 173.

FANNIE B. ALLEN, Complainant,
*vs.*
HENRY F. GILLETT, Defendant. } No. 173.

The demurrer of Henry F. Gillett, defendant, to the bill of complaint of Fannie B. Allen, complainant in the above case.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's
27 bill to be true in such manner and form as the same are therein set forth and alleged, does demur thereto, and for causes of demurrer shows—

First. That the said complainant has not, in and by her said bill, made or stated such a case as does or ought to entitle her to any such discovery or relief *or* is thereby sought and prayed for, from or against the defendant.

Seconds. That complaint is based on the non-distribution or non-partition of the estate of James Morgan until subsequent to the sale under said mortgage or trust deed to the Texas Banking and Insurance Company, January, 1873, but no facts are shown in any reasonable manner tending to show neglect or breach of duty in the executors or defendant thereby, or tending to explain or excuse the lack and neglect of said complainant and all others interested in said estate to demand and cause such distribution and partition or to show that the same was not with the approval and acquiescence of all concerned.

Third. That complaint is made of the non-rendering of account exhibit and giving information of the condition of said estate, the property, etc., thereof, and of the interest of said plaintiff, but that no allegations of any demand, request, or effort, in any manner, to obtain such information or all information desired on the part
28 of complainant, her husband, or any and all parties concerned, are made in said bill, and no fault or wrong by the said bill is imputable to defendant in that behalf.

Fourth. That the allegations of said bill as to the acts of defendant in connection with the making of said mortgage or trust deed, and especially as to any promise, obligation, or duty on the part of defendant in connection with payment thereof, or avoiding the sale of the mortgaged premises, are general, uncertain, undefined, vague, and loose, without any specification of date, place, or any circumstances to render the same fairly and reasonably intelligible to or issuable by this defendant.

Fifth. That it appears by said bill that complainant and her said husband had ample and reasonable notice for, say, more than five months prior to said sale; that said note would have to be paid by them or sale of the mortgaged premises would take place, and the

knowledge thereof, with the opportunities it offered, estop complainant from all reasonable complaints as to the making of said sale.

Sixth. That no facts are shown to render it inequitable or incompetent for defendant to have become the purchaser at said sale.

Seventh. The allegations in said bill of the opportunity in 1873 to have made the alleged sale for seven thousand dollars, and
29 of the transactions respecting the defendant in connection therewith, are all general, uncertain, and indefinite, without specification of the person proposing said purchase, the date, or any circumstance thereof, and without any specification of date, place, or other circumstances connected with the transaction or conversation with defendant concerning the same, to give defendant reasonable information thereof or make response thereto.

Seventh. (*a*) The bill shows a decree of the district court of Harris county, Texas, in the year 1877, in a partition suit brought by parties interested in said estate of James Morgan, deceased, against the executors thereof, in which the interest of the complainant, purchased by defendant in 1873, was decreed and partitioned to defendant, and the bill shows that said complainant was made a party thereto, and the allegations in the bill by which complainant seeks to deny the binding effect of said decree are insufficient and vague and general, and without specification of any facts or circumstances to deny or avoid the operation of a decree of a court of general and competent jurisdiction.

Seventh. (*b*) The bill shows knowledge of the judgment and decree in said suit on the part of complainant in the year 1877 or '8,
30 and shows such acquiescence therein and such laches on the part of complainant as estop her from denying the conclusiveness of such judgment.

Eighth. That the offer of defendant, five years or more before the institution of this suit, shown in said bill, to permit the redemption of said purchase by her, and the acts of complainant in response to and concerning the said offer, shown therein, estop complainant from all equitable claim or action herein, and no facts are shown in relation to said complainant or to her said husband which should induce a court of equity, after this lapse of time and the changes in circumstances and in values of property, to decree the recovery or redemption of said property.

Ninth. The said bill shows laches, acquiescence, and neglect on the part of said complainant and of her said husband, without explanation thereof or excuse therefor, which do not entitle complainant to relief in equity.

Tenth. The said bill is multifarious in joining a suit for said property and proceedings relating to the alleged unadministered estate of said Morgan.

Eleventh. The said bill is indefinite, uncertain, and vague in its allegation, without specification as to date, place, or circumstances, to enable defendant to have reasonable information thereof or make response thereto.

31 Twelfth. Wherefore, and for diverse other errors and imperfections appearing in said bill, this defendant prays the

judgment of the honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein complained, and prays to be hence dismissed with his reasonable costs in the behalf sustained.

BALLINGER, MOTT & TERRY,
*Counsel for Defendant.*

We certify that, in our opinion, the foregoing demurrer is well founded in point of law.

BALLINGER, MOTT & TERRY,
*Counsel for Defendant.*

Endorsements: "Ch. No. 173. Fannie B. Allan *vs.* Henry F. Gillett. Demurrer to bill. Ballinger, Mott & Terry, counsel for defendant. Filed Jan'ry 7, 1884. C. Dart, clerk, by Geo. C. Rives, dep'ty."

*Affidavit of M. F. Mott. Filed Jan'ry* 7, 1884.

Circuit Court United States, Eastern District of Texas. In Equity.

FANNIE B. ALLAN, Complainant,
*vs.*
HENRY F. GILLETT, Defendant. } No. 173.

32 Now comes M. F. Mott, one of the attorneys of Henry F. Gillett, the defendant in the above-entitled cause, and, being duly sworn, on oath says that the said defendant is not a resident of Galveston county; that he resides not far from Cedar Bayou, in Harris county, Texas. Deponent expected that the said defendant would this day be in the city of Galveston for the purpose of swearing to a demurrer filed in this cause by deponent's law firm, Ballinger, Mott & Terry, this 7th day of January, 1884, on behalf of the said defendant.

That from some cause or causes, to deponent unknown, the said defendant has failed to reach the said city of Galveston up to this hour, viz., twenty minutes before six o'clock of said day, and deponent now has no reason to suppose that he will reach here before twelve o'clock to-night.

Deponent further says that he has read said demurrer and is familiar with it, and that it is not interposed for delay.

M. F. MOTT,
*Att'y for Defendant.*

The foregoing affidavit on the reverse hereof was subscribed by M. F. Mott in my presence and was then sworn to before me this 7th day of January, A. D. 1884.

[SEAL.]

GEO. C. RIVES,
*Commissioner U. S. Circ't Court E. D. Texas.*

33 Endorsements: "Ch., 173. Fannie B. Allan *vs.* H. F. Gillett. Affidavit of M. F. Mott. Filed Jan'y 7, 1884. C. Dart, clerk, by W. L. Hanscom, dep't."

*From Rules. Def't's Demurrer. Filed Jan'y 7, 1884.*

FANNIE B. ALLAN, Complainant,
*v.*
HENRY F. GILLETT, Defendant. } Equity No. 173.

On this 7th day of January, A. D. 1884, come- the defendant and files his demurrer to the bill of complaint herein.

Attest: C. DART, *Clerk*,
By G. C. RIVES, *Dep't.*

*Order Setting Def't's Demurrer Down for Argument. Filed Feb'y 1, 1884.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston. In Equity.

FANNIE B. ALLEN
*v.*
H. F. GILLETT. } ✕ 173.

And now comes the complainant and sets the demurrer filed in said cause down for argument on the first day of the next term and requests the clerk to make the necessary entry.

BRADY & RING,
*Solicitors for Complainant.*

Endorsements: "173. Fanny B. Allan *vs.* H. F. Gillett.
34 Order setting def't's demurrer down for argument. Filed Feb'y 1, 1884. C. Dart, clerk."

*From Rules. Demurrer Set Down for Argument.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston. In Equity.

FANNIE B. ALLAN
*vs.*
H. F. GILLETT. } No. 173.

And now comes the complainant and sets the demurrer filed in said cause down for argument on the first day of the next term and requests the clerk to make the necessary entry.

BRADY & RING,
*Solicitors for Complainant.*

Entered Febr'y 1st, 1884.

Attest: C. DART,
*Clerk U. S. Circ't Court S. D. T., G.*

*Leave to Complainant to Amend.*

From the Minutes, March term, March 11, 1884.

FANNIE B. ALLAN
*v.*
HENRY F. GILLETT. } Ch., 173.

Upon application, leave is given complainant to file an amended bill.

*Amended Bill. Filed March 11th, 1884.*

In the Circuit Court of the United States for the Eastern District of Texas, at Galveston. In Equity.

FANNY B. ALLAN
*vs.*
H. F. GILLETT. } 173.

35 Amendment to bill of complaint in this cause made pursuant to an order of court entered on the — day of March, 1884, with the consent of defendant's counsel.

First. In paragraph 3rd, in the first line of said paragraph, after the word "will," insert the following: "A copy of which said will is hereto attached and made a part of this bill, the same being marked 'Exhibit B.'"

Second. At the end of paragraph 7th add the following: "That at the time said deed of trust was executed complainant was very young, wholly inexperienced, and relied in the matter solely on the advice of the said Gillett, her husband being a man of weak mental powers and being also wholly under the influence of the said Gillett, and that, acting entirely on his advice and suggestions and relying on his promises, she consented to the execution of the deed of trust."

Third. In the 16th paragraph, just before the prayer for general and special relief to which she may show herself entitled, and after the words "said lands" in the next preceeding sentence, insert the following:

"And since complainant may be unable to redeem her said interest in said estate & lands, by paying to defendant the sum of
36 money to which he may be entitled within such reasonable time as the court may determine, complainant prays that it be provided in the decree which may be rendered in this cause that a special master, to be named in said decree, shall proceed to sell in the manner therein provided for so much of said lands as shall be necessary to satisfy the claim of the said Gillett, and that said Gillett be decreed to reconvey to your orator the residue of said lands, if any, not sold by said master.

FANNIE B. ALLAN.

BRADY & RING,
*Solicitors for Complainant.*

EXHIBIT B. Estate James Morgan.

*Petition.*

THE STATE OF TEXAS, *County of Harris:*

In County Court. April Term, 1866.

To the Hon'l. Ingham S. Roberts, chief justice:

Your petitioner-, George Ball and Henry F. Gillette, citizens of Galveston & Harris county, respectfully represents that James Morgan, who was a citizen of this county, died 1st day of March, 1866, leaving a last will and testament, in which your petitioners, with N. A. Smith, of South Carolina, were appointed executors, which will is herewith filed; wherefore your petitioners pray that the same may be proved up and established after due notice;
37 and as in duty bound will ever pray.

April 2nd, 1866.

GEO. BALL.
H. F. GILLETTE.

Filed April 2nd, 1866, and due notice of the filing hereof this day given in terms of the law.

STERLING FISHER, *Clerk.*

*Will.*

STATE OF TEXAS, *County of Harris:*

Be it remembered that I, James Morgan, of the county and State aforesaid, being of sound and disposing mind, but aware of the uncertainty of life, do make and declare this my last will & testament, hereby revoking all others, and by this instrument do devise and bequeath all my estate, both personal and real, in the following manner, to wit:

1st. I will and bequeath unto my residuary legatees all my household and kitchen furniture, farming utensils, library, &c., to be kept on my place known as New Washington during the time that my servant girl Elizabeth shall remain on the place, and then to be disposed of by my executors hereinafter named.

2nd. I do further will that the claim against me by Wm. H. N. Smith, of Murfreesborough, North Carolina, is not to be barred by the statute of limitation, but to be justly and honestly paid from my estate by my executors.

38 3rd. I do further will that Mrs. Kos. Morgan may occupy the homestead of New Washington, if she chooses, so long as she remains the widow of the said Kos. Morgan.

4th. I do further will that my servant Tempy shall have a home at New Washington so long as she wishes to remain there.

5th. I do hereby constitute and declare the children of Son Kosinsko Morgan and his wife Caroline, to wit, Fannie Belle, Charles W., P. May, Maria Orphelia, & Nellie Latham and Ellen Lee, the daughter of my daughter Othelia Lee, my residuary legatees, and to

them in equal shares I will devise and bequeath all my estate & property, both real and personal, wherever the same may be, after all just debts against my estate and expenses accruing in the settlement thereof shall have been paid and discharged.

6th. I hereby constitute and appoint George Ball, of Galveston county, and H. F. Gillette, of Harris, both of the State of Texas, and Mr. Wm. N. H. Smith, of Murfreesborough, North Carolina, the executors of this my last will and testament (and to qualify without bond), with power, jointly or either two of them, to do all such acts and things, to sell any property necessary for the liquidation
39 of debts, and to take all such steps and measures as may be necessary or expedient in the discharge or execution of the trust hereby reposed in them, and in payment and discharge of all the provisions and bequests herein contained, and in the administration of the estate and property devised and disposed of by virtue of this testament; and, finally, it is my special desire that when this my last will and testament shall have been proven and recorded and an inventory and appraisement of my estate recorded in the probate court neither such court nor any other shall have anything further to do with the administration of my estate, but my said executors, George Ball, H. F. Gillette, and W. H. N. Smith, or any two of them who shall qualify and act, shall have full control of my estate under the will without accountability to any judge or court further than before expressed by the will.

In testimony whereof I have hereunto signed my name and affixed my seal, using scroll for seal, this the 18th day of July, one thousand eight hundred and sixty-five.

J. MORGAN. [SEAL.]

Witnesses:
CHRISTOPHER ROBINSON.
ASHBEL SMITH.
WM. SYMKINS.

40 CODICIL.—I further will & bequeath that no part of the tract or parcel of ground known as the Orange Grove, containing sixty acres, is ever to be sold, as it contains the graveyard of my family.

J. MORGAN. [SEAL.]

Witnesses:
ASHBEL SMITH.
WM. SYMKINS.

Filed April 2nd, 1866.

STERLING FISHER, *Clerk.*

*Proof of Will.*

Personally appeared in open court Ashbel Smith, of Harris county, one of the subscribing witnesses to the instrument *to the instrument* filed as the last will of James Morgan, deceased, and, being duly sworn, on oath says that he was personally acquainted with the said James Morgan, deceased, and that he recognizes the instrument now

presented as the same which said Morgan called on him to witness as his last will in the presence of Christopher Robinson and William Symkins; that he and said Robinson & Symkins signed the same in the presence of said Morgan and at his request and in the presence of each other, and that said Morgan and each of said witnesses were over the age of twenty-one years, and that said Morgan was at the time of signing the same of sound mind.

ASHBEL SMITH.

41 Sworn to & subscribed in open court this 30th April, 1866.
STERLING FISHER, *Clerk.*

Filed April 30th, 1866.

STERLING FISHER, *Clerk.*

*Order. Estate James Morgan.*

From Minutes, April Term, 1866.

In the matter of this estate the petition of George Ball and H. F. Gillette for the probate of the last will and testament of James Morgan, deceased, coming on to be heard, and it appearing to the court that due and legal notice of the filing thereof has been given by the clerk in terms of the law, and no one appearing to oppose or contest the same, and the evidence of Ashbel Smith, one of the subscribing witnesses thereto, having been taken in writing in open court, sworn to and filed of record in substance as follows: That at the request of James Morgan, dec'd, and in his presence and in the presence of Christopher Robinson and William Symkins, also witnesses, they signed the instrument of writing here exhibited, dated July 18th, 1865, and signed by James Morgan; that the said James Morgan at the time of signing said will was above the age of twenty-one years and of sound mind and acknowledged the said instrument of writing as his last will and testament and called upon them to witness the same, and that he signed the same in
42 their presence and they in his presence and in the presence of each other: It is, therefore, considered, ordered, and adjudged that the said instrument of writing be taken, considered, and established as the last will and testament of James Morgan, dec'd. It is further ordered that George Ball and H. F. Gillette be appointed executors thereof; it is further ordered that W. R. Baker, Will Powers, and J. G. Walker be appointed appraisers of said estate and continued.

THE STATE OF TEXAS, *County of Harris:*

I, Alex. Erickson, clerk of the county court in and for said State and county, hereby certify that the above and foregoing instrument of writing is a true and correct copy of the petition, will, proof, & order of court in the matter of the estate of James Morgan, deceased, as same appears of record in book volume "Q," page- 485, 486, & 487, probate records, Harris county, Texas.

Witness my hand and seal of office this 29th day of February, A. D. 1884.

[SEAL.] A. ERICKSON, *C. C. H. C.*,
By LAWRENCE L. COHEN, *Deputy.*

Endorsements: Ch., 173. Fanny B. Allan *vs.* H. F. Gillett.
43 Amendment to bill of complaint. Filed March 11, 1884.
C. Dart, clerk.

*Def't's Demurrer Heard & Submitted.*

From Minutes, March Term, March 12, 1884.

FANNIE B. ALLAN
*v.* } Ch., 173.
H. F. GILLETTE.

This day — the parties to this suit, by their attorneys, and thereupon came on to be heard the defendant's demurrer to the complainant's bill, and the same, being argued by counsel before the court, were submitted.

*Def't's Demurrer Overruled.*

From the Minutes, March Term, March 15, 1884.

FANNIE B. ALLAN
*v.* } Ch., 173.
HENRY F. GILLETTE.

On this day again came the parties to this suit, by their counsel, respectively, and the demurrer of the defendant to the complainant's bill having been heard and fully argued by counsel for defendant and complainant at a former day of this term and submitted to the court for its consideration, and the court having now duly considered the said demurrer and being fully advised, it is considered and ordered by the court that the said demurrer be overruled.

It is further ordered that defendant have until the rule day in May, 1884, in which to file his answer.

44 *Def't's Answer. Filed May* 31, 1884.

In the Circuit Court of the United States, Eastern District of Texas.
In Equity.

Between FANNY B. ALLAN, Complainant,
and
HENRY F. GILLETTE, Defendant.

The answer of Henry F. Gillette, defendant, to the bill of complaint of Fanny B. Allan, complainant.

This defendant, now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or unto so much and such

parts thereof as this defendant is advised is material for him to make answer unto, *he* answers and says:

That he admits the matters stated in the first, second, and third numbered paragraphs or clauses of said bill to be true, with the qualification that as to "other property" left by said Morgan the inventory of said estate and proceedings therein afforded the complainant full means of knowledge, but how far she was particularly advised of its nature and amount defendant is ignorant, and that as to the powers of the executors of the will of said James Morgan to
45 settle up said estate defendant refers to the will itself, a copy of which is an exhibit to the bill, and to the law in that behalf. A tract of 640 acres not included in the inventory and which subsequently came to the knowledge of defendant is explained in the answer to paragraph 16 of the bill.

To the fourth paragraph or clause therein this defendant says that it is true that the active duties of the administration of said estate by the executors thereof were performed by this defendant, but with frequent reference to and advice by said Ball, his co-executor, and between them, so far as he remembers, there was no disagreement, but entire co-operation, the acts of said Ball, however, in all instances being on an intelligent understanding of the matters and approval thereof by him, and not merely approving or concurring in the acts of defendant so as to give legal effect and force to their joint performance.

This defendant admits that he became familiar as far as he reasonably could with the values and details of said estate, and that he well knew the character of the interest therein of said complainant and of the value of the same, so far as its value was at all certain, owing to the manner in which payment of the indebtedness of the estate should be enforced and the indefinite value and diffi-
46 culties of sale of the lands of the estate, an interest by James M. Lee adverse to said will, of which defendant was ignorant, as hereinafter stated.

To the fifth paragraph or clause of said bill this defendant answers that it is not true that the indebtedness of said estate of James Morgan, deceased, was small in comparison with the value of said estate, or that the same was of comparative easy adjustment, or that said executors did not promptly and efficiently discharge their duties, or that it was within the power of said executors by any more prompt and efficient discharge of duty to have completed the administration and partition of said estate by the 13th June, 1872, without great sacrifice thereof; and defendant further denies that the mortgage of her said interest in the lands of the estate described in Exhibit A was in any degree whatever caused by the suggestion of this defendant, and on his best information and belief he denies that it was caused by the importunities of complainant's husband or of her family necessities, but was caused, as he believes, by her own improvidence and unnecessary extravagance.

To the contrary of the said averments in this clause of the complainant's bill, this defendant answers and says that the in-
47 debtedness of the estate of said Morgan amounted at the time

of his death to over twenty thousand dollars; that no part of his estate yielded any beyond a nominal amount of revenue; that it consisted almost entirely of wild lands in different counties in the State, and principally in localities where lands were of the lowest value and least in demand, considerable part of said lands being in dispute as to the title also. This defendant had been long and intimately known to the said James Morgan, and resided, a neighbor to said Morgan, in the county of Harris, more than thirty-five miles distant from Houston, the county seat, and about forty miles from Galveston; was a man of small means, without capital; not given to trade, much less speculation; living in a frugal and plain manner, his life having been mainly devoted to teaching school, and at the time and having since continued in charge of an asylum for orphans of deceased soldiers, maintained principally up to 1878 by his personal appeals for aid to them and his personal management of the institution.

That his utmost attention, diligence, and zeal were at once and continuously and unremittingly devoted to the business of said estate. If the indebtedness had been attempted to be paid by
48 any public sale of lands of the estate at any time prior to the date mentioned, June 13, 1872, or to a much later date, with every means of publicity in the power of the executors, the entire estate would have been insufficient therefor. The condition of this State following disastrous civil war, with general financial disturbance and embarrassment, culminating in the panic of 1873, are public facts. Sale of lands in the locality of the lands of the estate in considerable quantity was impossible except at mere sacrifice; sale could only be made at approximate estimate of intrinsic value when a purchaser could be found needing the land, and generally in small tracts to poor persons buying for a home, requiring credit.

This defendant had the best correspondent his knowledge or information enabled him to obtain in each county in which land of the estate was situated, with instructions to do all in their power to effect arrangements for sale of said lands at reasonable prices, authorizing agreements therefor in tracts to suit purchasers and with liberal credit in order to make sales.

At the same time defendant employed his utmost exertions to induce the creditors of the estate to accept their pay in lands of the estate, and arrangements to that effect were made in a number of instances, greatly to the relief and aid of the estate, the same
49 being through the active personal solicitation of the defendant.

This defendant annexes as Exhibit Number 1 to his answer, a schedule of the indebtedness of the estate of said James Morgan, except taxes, &c., and as Exhibit Number 2 a schedule of the sales of property of the estate made by the executors, and as Exhibit Number 3 a schedule of payments and advances made to the mother of the complainant and her children, and as Exhibit No. 4 a certified copy of the decree of the district court of Harris county in settlement of the said estate with the parties entitled thereto, and as Exhibit No. 5 a certified copy of the final decree of partition made of the

estate of said James Morgan among his heirs and claimants thereto, all of which are referred to and made parts of this answer as showing the matters therein contained without special statement thereof herein.

Defendant further says that subsequent to the date of said partition James M. Lee, who was a grandson of the said James Morgan, but to whom said Morgan left nothing by his will, brought suit against the parties to whom the said lands of the estate of said James Morgan had been so partitioned and decreed, claiming that all said lands were community property of said James Morgan and
50 of his wife, —— Morgan, the grandmother of said Lee, and that he was entitled, in right of his mother, who was one of only two children of said Morgan and wife and as one of only two heirs left by his mother, to the equal undivided one-eighth interest in all the lands and estate so standing in the name of said James Morgan, and which had been administered upon and partitioned as his estate. The facts alleged not admitting of dispute, the said Lee recovered a decree against this defendant and all the other parties who had received shares under said decree of partition for the equal undivided one-eighth part thereof, and on the 28th day of January, 1882, the defendant obtained by purchase from said Lee the undivided one-eighth interest or part in the said lands so decreed and partitioned to this defendant in right of his purchase of the interest of said complainant, and conveyance thereof was made to this defendant by said Lee so that the interest of said complainant was not, as alleged by her and as supposed and understood by defendant at the time of said purchase, the one-seventh, but only the one-eighth in and to the said lands so held by said Morgan, and defendant claims the full benefit of his said purchase from said Lee; that he paid therefor the sum of two hundred dollars, which was at the date of said purchase the full market value thereof, the same being in the hands of competent and experienced agents for negotiation
51 and sale, and said price being more than could be obtained therefor otherwise.

To the sixth paragraph or clause in said bill this defendant admits the matters therein stated as to the father of said complainant, the number of children left by him, their residence with and support by said Morgan, and the said will shows the provisions thereof. What is meant in the said bill by "tender" and "tenderly" defendant does not precisely know and does not answer thereto.

To the seventh paragraph or clause in said bill this defendant answers that he admits complainant's marriage to said Harry L. Allan, as stated, and that said Allan was dependent on his labor as clerk, &c., but was competent and experienced therefor. He cannot answer as to the thoughts or expectations of said complainant with respect to the administration of said estate; that the complainant well knew the condition of said estate as to the large amount of indebtedness thereof and the nature of the property and resources for its payment; that she also well knew, as the facts were, the anxious efforts of this defendant to provide for the payment of the indebtedness to the very best advantage, not to sacrifice the lands of

52 the estate, but to preserve them to the utmost extent possible for devisees.

She was also informed and knew and had full means of knowing the unsaleableness of the lands of the estate as a resource for the payment of its debts or as a resource to raise money upon. All the allegations that said Harry L. Allan became unfortunate in business or was unable to obtain employment to meet his family expenses, or was afflicted or affected with sore eyes to the extent alleged, if true, were unknown to this defendant, but defendant does not believe them to be true, and on his best information and belief he denies the same to be true. Defendant further says that the further statements in said bill that about the 13th June, 1872, complainant, in company with her said husband or either of them, called on this defendant and then and there requested or entreated defendant to let said complainant have her portion of said estate or to arrange in some way to make the same available, so as to relieve complainant and her husband from pressing wants of themselves and family, or that this defendant suggested or advised that they could obtain money on her said interest by mortgaging said interest in said estate, or proffered his assistance to negotiate as stated, or in any other manner or for that purpose did assist them to get the
53 Banking & Insurance Company of Galveston to discount the joint note of complainant and husband for the sum of twelve hundred dollars or any other sum, are each and all wholly untrue and unfounded, and this defendant denies each and all of said statements in whole and in every part.

And this defendant further says that so far as he ever knew or heard or believes to be true the said complainant and her children were reasonably well and adequately supported by her husband, whose salary was sufficient therefor, with the aid from his family, and this defendant at no time received any information from complainant or her husband to the effect that their family necessities compelled them or her to make her said interest in the estate "available" for their support, or to raise money on the same for such purpose; on the contrary, defendant believes from all information he had that they were getting along in comfort, and so far as defendant had communication with complainant, or her husband, or with any of the other devisees, or those representing them, it was to encourage them to rely that the largest amount which was possible would be preserved of the lands of said estate for their benefit after payment of its debts in the most prudent manner, and that
54 by appreciation of the lands their respective interests would be of substantial value to them. Defendant understood and believed that the younger children resided in Kentucky with relatives able and disposed to provide for them, in addition to such advances as were made by the estate under defendant's management, and defendant was influenced solely by what he believed the true and best interests of the devisees of said Morgan and the most beneficial performance of his duties to them.

All the statements in said bill of a negotiation for a loan, mortgage, or trust deed of or upon the interest of complainant in said

estate with the Texas Banking and Insurance Company, and of any suggestion thereof, aid therein, connection therewith, or of any privity or connection therewith on the part of this defendant, are each and all wholly untrue and are hereby denied in whole and in every part. The said loan was effected and the said mortgage or trust deed executed wholly without consultation with this defendant, or any knowledge or information thereof on the part of defendant, or of any purpose or intent on their part connected therewith, or of any suggestion whatsoever relating to the same, this defendant having been wholly ignorant of the said mortgage or trust deed and said loan and of the supposed necessity therefor, and of all negotiations, steps, or proceedings in any manner in regard to the same.

55 This defendant does not know and cannot answer as to the amount of money obtained or received upon said note.

As to the statements in said bill that said money so raised was necessary to the support of said complainant and her family this defendant, on his best information and belief, denies the same to be true, and avers that the money was raised to indulge in a pleasure trip to Kentucky and possibly to other points, and in extravagance wholly inconsistent with the pecuniary condition alleged by complainant.

This defendant says that his conversations with the complainant and her said husband in regard to said estate and matters connected therewith extended from near the time of her marriage and were occasioned when he would meet them or either of them in Houston, where they first resided, and afterwards in Galveston, where he saw them less frequently, and during all said time defendant was free and open in communicating to them all matters he supposed at the time of interest to them connected with the business of said estate, and never failed to answer with entire frankness and without any reserve all enquiries by either of them in regard to the same.

56 To eighth paragraph or clause in said bill this defendant answers that he admits the execution of said mortgage or trust deed on the interest of the complainant in the lands contained and described in Exhibit A to secure the payment of said note, but he denies that said mortgage or deed of trust was made at the suggestion of defendant as the only way complainant and her said husband could obtain any money out of said interest, or was made at the suggestion of defendant at all or in any manner or for any purpose, or that the same was negotiated or agreed upon with said company through the assistance of defendant, and he denies that he gave any assistance in said negotiation or in obtaining said money or in procuring the acceptance of said mortgage or trust deed or in suggesting or advising the same to any person whatever, or that he had any cognizance thereof whatever or any privity therewith. This defendant denies that he did, before or at the time of making said negotiation or before the making of said mortgage or deed of trust, suggest or promise complainant or any one else that defendant would do the best he could in protecting her interest in said estate or that he would make her interest in said estate available so as to pay off said note and thereby prevent the sale

of her said interest under said mortgage or deed of trust, or that defendant did thereby or in any manner whatever induce complainant to believe that there would be no danger of her interest
57 being sold to pay said mortgage. Each and all of said allegations are wholly untrue and unfounded; and this defendant repeats that he was entirely ignorant of the execution of said note, mortgage, and trust deed, and of any and all negotiations with reference thereto, and had no connection or privity therewith or with said company or said complainant or her said husband. This defendant also expressly denies that at the time when said negotiations are alleged to have taken place that defendant was familiar with the financial necessities of complainant and her family or with the poor business capacity of her said husband, as said necessities and capacity are stated and alleged in the bill. Defendant was not aware of any condition on their part necessitating the raising of said money or of making said mortgage, or that they were unable to get along, with proper prudence on their part, without a resort to the availability of or security upon her interest in said land.

And defendant, on his best information and belief, now states that no such condition did, in fact, exist.

The statement in the bill that *if* complainant had believed that defendant would have failed to protect her interest, as defendant led her to believe, as stated in said bill, is wholly untrue and is denied, this defendant again denying each and every statement in
58 the bill attributing to him any conversation or action with complainant, her husband, or said company in any manner leading to or connected with said loan, mortgage, or trust deed. This defendant further, on his best and utmost remembrance and belief, denies the truth of the statement in said bill that about a month after she had signed said mortgage or deed of trust this defendant informed her by letter that he was sorry she had made said mortgage and the further recitals of said alleged letter; and this defendant, in like manner, denies such communication, by letter or otherwise, to complainant at any time as stated in said bill or in any manner upon the subject therein alleged.

The statements in said bill of defendant's refusing and failing to pay said note and permitting said mortgage to be foreclosed by sale thereunder, connected, as they are, with said statements of the action of defendant in the negotiation of said loan and mortgage, and the expectation thereon that defendant would prevent said sale, are wholly untrue and without any foundation, and are wholly denied.

Defendant admits that he became the purchaser at said sale, as will be hereinafter more fully set forth.

To the ninth paragraph or clause in said bill this defendant
59 answers that the date of letters testamentary to the executors of said Morgan was ——, 1866; that said note to said Texas Banking and Insurance Company matured Dec. 13, 1872.

The amount of property belonging to said estate disposed of to the latter date by the executors is fully shown in exhibit hereto marked No. 2. Defendant denies that none of the proceeds of said property had been paid to complainant, or that she had not received any of

the benefits of said estate; on the contrary, payments had been made to her as shown in said Exhibit No. 3.

Defendant also denies the statement in said bill as to payments to complainant's mother and the other children, but, on the contrary, shows that payments had been made, which are likewise set forth in said Exhibit Number 3.

Defendant further says that as to the statement in said bill that the executors well knew said other children had no other means for their support and maintenance except what was coming to them from their said grandfather's estate, then in the hands of said executors, until said estate was partitioned, the facts are that defendant was informed and believes and avers the truth to be that said children resided with and were in the care of their relatives in the State of Kentucky, possessed both of the means and disposition to
60 provide for the support, maintenance, and education of said children, with such amount of aid therefor as was remitted by this defendant, without insisting on or desiring further means for said children to be raised by sales of the lands of said estate, but preferring that debt should be paid in the most prudent manner and the interest of the children preserved, with a view to its appreciation in value and future benefit to them. This defendant had every reason then to believe and still believes this course to have accorded with the wishes of the relatives of said children in charge of them and who were mainly providing for them, and if there was any discontent or dissatisfaction with the action of the executors this defendant was never advised or made aware of it, but, on the contrary, was led to believe and does believe that the same was approved.

This defendant admits it to be true that a decree appointing commissioners to make partition of said estate was rendered April 25, 1877, and a decree confirming the report of said commissioners and making said partition among the devisees under said will, or the purchasers and owners of their interests, respectively, was entered Dec'r 10, 1877, by the district court of Harris county, Texas, in a suit brought therein by C. C. Lewis, Sep'r 28, 1875, said Lewis
61 having been the purchaser of the interest in said estate of Charles W. P. Morgan, one of the devisees in said will, and said suit having been brought against the said executors and against all the devisees in said will except the complainant herein, this defendant having been alleged in said petition to be the purchaser of her share and interest in said estate.

As to the statement in said bill in said paragraph that said executors nor either of them, during the period therein specified, made any showing whatever to any of said devisees under said bill as to the value or condition of said estate or in what way the same was being by them administered, this defendant denies the truth thereof; on the contrary, he says that at various times prior to the date of said loan by complainant and her husband from said company, commencing soon after the marriage of said complainant, but at what particular dates he is unable to state, he gave to said complainant and to her husband as full and fair

statements as he was able to do of the condition of said estate, the amount and value of its property, the amount of debts against it, the payments made, and the course and view of the executors with respect to payment of the debts, and defendant in all such conversations encouraged complainant to hope that by holding
62 on to her interest in said estate it would become of substantial value to her. At no time was defendant informed by complainant or her husband that their situation compelled them to obtain money for or on said interest, or that it was their intention or wish so to do, or that they or either of them dissented from or complained of the course of the executors in the administration of said estate, or regarded it otherwise than as judicious and for the best interests of the devisees; and defendant most positively states that he never failed to answer fully and frankly all enquiries by either complainant or her husband respecting any and every matter connected with said estate or the action of the executors; that he never had the slightest purpose or thought of any concealment from them or either of them in regard to any matter connected with said estate.

He says further that the other devisees of said estate resided in Kentucky; that none of them, so far as he ever heard or believes, had any lawful guardian; that they became of lawful age subsequent to the said complainant, who was the oldest of them, but at what particular dates defendant is unable to set forth, prior to which there was no capacity by them to convey their lands; that the correspondence in regard to the condition of said estate
63 and the action of the executors was mainly with relatives having care of them; that the same was as full, as defendant supposed, of any interest or importance for all proper information respecting their interests; and defendant is positive in the statement that there was never any failure on his part to answer fully and frankly all enquiries by any of said devisees or any relative for them in any matter in regard to said estate.

As to the statement in said bill and in said paragraph of the failure to account to complainant for her interest in said estate or to in any way inform her of the probable value of the same, or give her any other information as would enable her to understand the amount and value of her said interest, defendant says that he does not know the import intended to be given therein to the term "account." The estate left by said Morgan—the lands owned by him—were well known to said complainant, and were shown by the public records of the inventory in Harris county. Whilst defendant cannot say that he ever laid before complainant or her husband a schedule of said lands or of the debts of the estate or of all the particular transactions therein, the general amount of said lands & their location he is certain were known to complainant and her husband; also the general indebtedness of the estate and the payments made and modes of such payment; and were subjects
64 of conversation between them, and their information was as special and particular as was at any time desired, or that defendant supposed of any benefit or utility to them; and, in particu-

lar, defendant is positive in his statements that he explained to them the difficulty of the sale of lands of the estate; that they could not be sold at public sale or forced on the market, except at nominal prices; that public or forced sale of lands to pay off the debts of the estate would compel the sacrifice of large amounts of its lands; that by inducing creditors to take lands and making such sales of particular tracts as purchasers desiring the same could be found the bulk of the lands could be saved for the devisees, and by appreciation in value would prove of substantial aid to them.

And defendant further says that up to the time he became aware of the execution of said note and trust deed by said complainant and her husband, as hereinafter stated, he had no knowledge or information of any dissatisfaction or complaint or action governed by other opinions or views on the part of complainant or her said husband.

To the tenth paragraph or clause in said bill defendant answers that statements as to the value of the interest of said plaintiff are estimative and matter of opinion dependent on facts then
65 undeveloped and uncertain, and therefore not capable of test as positive fact, but that defendant denies, on his best information and belief, that the interest of said complainant in said lands was at the time of said sale or at any time previously worth three times the value that defendant gave for the same, and he denies that there had been any improper administration of said estate which depreciated the value of said interest, and he denies that if said estate had been administered so that prior thereto the lands had been partitioned among the devisees, said interest would have been worth more than in its then condition, but, on the contrary, it would have been of less value.

Defendant admits his active efforts to acquaint himself with the value of the different lands of the estate and to dispose of such as were most saleable to pay off its debts, but that information had assured him of the facts hereinbefore stated that public or forced sale of said lands would be at such low prices as would probably absorb ihe whole of them without paying the debts, and it was not the belief of defendant at the time of said sale that a purchaser of said interest would reimburse himself unless the executors were permitted to proceed with settling debts to best advantage, and except by holding said lands a long period of time.

66 Defendant denies the statements reiterated in said paragraph of failure on his part to inform complainant in regard to her interest and of all matters affecting the value thereof as fully as he had opportunity to do, and denies all concealment of any fact or matter in anywise relating to said estate, its administration, or the nature or value of complainant's interest therein, and he denies that he did have or take or exercise any undue advantage or any advantage whatever over complainant or her husband or any other person in bidding in said interest and becoming the purchaser thereof at said sale, or that he did any act whatever to cause or bring about said sale or prevent the best and fullest price from being obtained or which could in anywise un-

favorably or injuriously influence or affect the interest of said complainant and her said husband or either of them.

Defendant further says that a fair and full recital of the circumstances of his purchase of said interest is as follows:

That he was entirely ignorant of the borrowing of said money by complainant and her husband or of any mortgage of or trust deed upon their interest in said lands until a very short time prior to the sale under said trust deed he read the advertisement of the sale to be made of said lands by the trustee in a newspaper, the
67 Galveston News, as he now remembers. This occurred in Harris county.

Not only had he had no connexion with said loan or trust deed, but he was absolutely ignorant thereof until he saw the advertisement for the sale as above stated. Defendant came to Galveston at once, and not more than two days preceding the day of sale.

The complainant, as he now remembers and believes, was sick and confined to her bed.

He saw her husband and expressed his astonishment at the fact of said trust deed, telling how he became aware of it. Said H. L. Allan replied that he had not desired to borrow the money and make said trust deed, but had yielded to his wife's importunities, as she desired to make a trip, and that it was an improvident act on their part.

Defendant enquired as to said Allan's means of paying the note and preventing the sale, and Allan stated that sale was inevitable; that the note could not be paid.

Defendant enquired if Mrs. Allan's relatives had been informed and appealed to, and he replied they had, but in vain. Defendant enquired if he had tried to find some one who would buy in the land or give a better price than it was mortgaged for, and he replied that he had done all he could to obtain extension of the loan and to find a purchaser for the lands who would give more for them
68 than the amount for which they had to be sold, but without any success. Said Allan stated that they had no alternative but to permit the sale for whatever the lands would bring, and supposed the banking company, the creditor, would make them bring the debt.

Defendant then saw Mr. Kimball, the officer of the bank he understood had charge of the matter, so as to learn the exact situation, and hoping to be able to aid in something favorable to complainant and her husband, but was informed by said Kimball that the sale would certainly take place unless the money was paid; that the bank would give no more for the lands than its debts and didn't want them at that amount.

Defendant then went to Mr. George Ball, his coexecutor, who was a man of wealth, and stated to him the facts, suggesting the purchase of said interest by said Ball, the motives assigned therefor being that if the bank purchased it might coerce the executors into a sale of the lands for payment of the remaining debts in a manner

to injure the interest of the devisees of the testator whose interest was the object defendant had labored to secure.

This defendant was a poor man, living with constant industry and with strict economy. The thought of the purchase on
69 his own account had not even suggested itself to him, because he was wholly without the means therefor and had never attempted a speculation by the purchase of property for resale in his life.

The said Ball declined on the ground that he had little confidence in investments in lands so situated, and that it would not prove profitable. Defendant argued with him that he would not lose money, but by waiting until lands appreciated he would be repaid. The said Ball then surprised defendant with the offer to lend him the money to make the purchase, stating that he united in defendant's apprehension that purchase by the bank might prove prejudicial to the interests of the other heirs, and that he would wait on defendant for payment until the lands could be sold favorably. Defendant had the utmost confidence in the kindness and well-meaning of said Ball, and under these circumstances made up his mind to attend said sale and bid the amount of the debt and expenses of the sale, borrowing the entire money therefor from said Ball and another party.

Defendant, prior to said sale, saw said Allan, the husband of the complainant, and on hearing from him again that they could do nothing except to permit the sale to proceed for whatever the lands would bring, defendant informed said Allan of what had transpired
70 with said Ball and of the said conclusion on the part of the defendant, at which said Allan expressed his satisfaction at the prospect that defendant might become the purchaser instead of said banking company, as said Allan had supposed would be the case.

No objection whatever was suggested by said Allan to purchase by this defendant.

No complaint was in any manner made by him of any action or omission by defendant connected with the administration of said estate or the sale of the interest of said complainant.

No request or suggestion was made by him as to anything that defendant was or had ever been expected to do or could do to prevent said sale or be of aid or service to them.

And defendant says that it was utterly out of his power to prevent said sale or to have caused any larger or better price to have been bid or obtained for said interest of complainant. He says that but for his presence as a bidder he believes that the banking company, creditor, would have bought in the trust property at less than the amount of the debt, leaving a part of the debt still due and unpaid by complainant and her said husband. The said Henry L. Allan was present at said sale and heard and was fully aware of the bid by this defendant and defendant's purchase of said property, and
71 knew that the same was a purchase by defendant in his own personal right and for his own benefit and without any trust for or liability to complainant, and made no dissent thereto in any manner, but expressed satisfaction that defendant became such purchaser.

To the eleventh paragraph or clause in said bill defendant answers that he denies that shortly after the purchase of said interest at said sale by this defendant, to wit, about the month of April or May, 1873, or at any other time, the complainant applied to defendant to redeem said interest, purchased as aforesaid, by paying him the amount of said purchase and interest.

This defendant says that said statement in said bill is wholly without any foundation in fact.

He denies the statement in said paragraph giving defendant's reasons for the alleged refusal, because said application or refusal did not occur. And this defendant, also, on his best information and belief, denies the statement in said paragraph that said complainant had an opportunity of selling her interest in said lands for the sum of seven thousand dollars, provided she could redeem from defendant, and defendant therefore avers the same to be untrue and without foundation in fact.

72 To the twelfth paragraph or clause in said bill this defendant answers that as to the statements therein of complainant's going to Kentucky, and the time thereof, and motive or intention as to same—her husband's going to Kentucky, abandonment of her and her children without any means of support, and failure thereafter to contribute to their support, this defendant is ignorant as to the same, and leaves the complainant to any proof she deems proper with respect thereto.

As to the statement that from about the 13th June, 1872, to the time of said alleged abandonment her said husband was most of the time without employment and contributed but little, if any, to the support of his said family, defendant has no such information as enables him to answer thereto. So far as defendant knew or understood, up to the period of said sale her said husband was in employment generally, and defendant was unaware that he did not support his family or that their condition was one of poverty or necessity.

As to the statements of her affections for her said husband, and yielding to his wishes, &c., in said paragraph, this defendant knows no facts to question such affection or her general dutifulness as a wife, but has already stated and repeats that he was informed

73 by her said husband that said loan was effected and said mortgage and trust deed made against her said husband's judgment and advice, and without necessity, to gratify complainant's improvident desire for a trip.

To the thirteenth paragraph or clause in said bill defendant answers that he admits it to be true that the partition of the estate of said Morgan took place as alleged, and there were set apart to defendant, as purchaser of the interest of complainant, the lands therein specified, though for greater certainty and precision as to said lands he refers to a certified copy of said decree of partition annexed as Exhibit 5 to this answer.

Defendant denies that said lands were reasonably worth the sum of ten thousand dollars or any approximate amount. As facts best illustrating the value of said interest he states that he is informed

that said Lewis bought the interest of said Morgan for about $1,000; that subsequent to the partition the interest of Mariah, one of the heirs, was sold for about $1,200, and at the time of said partition this defendant in good faith, intent, and readiness to carry out the same offered the interest so purchased by him of complainant to J. C. Hutchinson (attorney for plaintiff in said suit and who subsequently bought from said Mariah) for the amount paid
74 by defendant and simple interest thereon, although defendant had borrowed the money at 10 per cent. per annum, and the purchase was declined by said Hutchison. He says also that the appraisement of the lands of the estate by the appraisers to the inventory thereof was at twenty-five cents per acre.

To the fourteenth paragraph or clause in said bill defendant answers that he is ignorant as to the knowledge on the part of complainant as to the proceeding in the district court of Harris county. Suit for same was brought Sep. 28, 1875, and decree rendered Dec'r 10, 1877, during which period of time said complainant was, as defendant understands, residing with or among her brothers and sisters who were parties to said proceeding and interested therein, and she had every opportunity for information in regard thereto. This defendant wrote to her, but does not remember the exact date in regard to certain land which was not embraced in the partition. He does not remember any offer on his part to said complainant to let her redeem said land by paying him the amount of the purchase-money and interest, and does not believe the same was made as stated in said paragraph of said bill, but defendant is confident in expressing the belief that there was never a time from the
75 date of his said purchase up to the date of said partition or to the date assigned for said offer by complainant at which this defendant would not have permitted the said complainant to purchase from him the interest he had acquired by paying him the amount paid by him therefor, with interest thereon at the rate paid by him, viz., 10 per cent. per annum, and, in fact, at a less rate of interest.

This would have been done by defendant not from the slightest sense of distrust of his title to the said lands so acquired or of his full, equitable, and moral right to the same, but because, at defendant's estimate of the value of said lands and in defendant's pecuniary condition, any gain to him by said purchase seemed altogether doubtful and hazardous, and if he had been compelled to reimburse himself by a prompt sale of said lands during any part of said period of time he does not believe the same would have been practicable. If said offer was made, as complainant alleges, it was made in good faith; and he denies all imputations in regard to the same contained in said paragraph.

Now, when the changed condition of the country, its great development and improvement, have appreciated the value of said lands, which have been husbanded by defendant for years, and the affairs of his business and life in great part have been adopted with
76 reference to them, he feels and alleges that denial of his title

thereto or recovery of the same by complainant would be in the highest degree unjust, inequitable, and unconscionable.

To the fifteenth paragraph or clause in said bill defendant answers that as to the statements of her pecuniary condition, her inability to consult or pay lawyers or return to Texas, or ascertain whether she had rights or cause of action as against this defendant, and as to all other facts or matters alleged in said paragraph, this defendant is ignorant and leaves complainant to her proofs in regard to the same, and claims the right to adduce any evidence he may deem material; but as to certain matters stated in said paragraph defendant specially says that he has heretofore denied and again denies each and every allegation on which the complainant bases her statement that defendant should have protected her interest and not permitted the same to be sold.

He says, further, that he believes and alleges it to be true that complainant's situation and surroundings, both as to relatives and associations, from the date of said purchase by defendant have constituted no obstruction to the ascertainment and knowledge of all rights and equities on her part as against this defendant con-
77 nected with or growing out of said purchase by this defendant. All the circumstances were open and public.

She has friends and relatives of influence, means, and intelligence and easy access to lawyers with keen sense of wrong and readiness to undertake redress for her if it had not been the case, as defendant believes and alleges, that, with full knowledge and correct understanding of the facts, neither the complainant nor any one on her behalf considered her as having demand, legal or equitable, against defendant. As to the advice given to her by the said John T. Brady that she had a good cause of action against this defendant, this defendant believes and alleges that, whatever may be the professional skill or good faith of the said Brady, the same have been stimulated by and involved in the condition of a large contingent and champertor interest on the part of said Brady in suit against this defendant, and defendant prays discovery of the same.

Defendant has heretofore answered as to relative influence of complainant and her said husband in the making of said loan and mortgage, so far as he had information.

As to the statement therein of intimate and confidential terms between defendant and her said husband defendant says that
78 the acquaintance between them was general, with but casual meetings and without frequent or intimate association, defendant's feelings towards said Allan being wholly friendly and kindly, and defendant believes he possessed said Allan's confidence very fully.

There was never any matter of business between them except as connected with said estate, and defendant has stated the same fully.

To the sixteenth paragraph or clause in said bill defendant says that the decree of the district court of Harris county, of Dec'r, 1877, shows the matters of said estate then remaining unadministered, and the administration of which was to be completed. No final and formal settlement has yet been made, but a full and correct

exhibit of all said matters unadministered is shown herewith and annexed to and made part of this answer as Exhibit No. 6.

Defendant says that there was other property belonging to said estate which was not covered by said mortgage or deed of trust and not purchased by this defendant, and which came under the control of the executors. Some of said property had been disposed of by the executors in the due course of administration prior to the making of said mortgage, and the same will be fully shown by
79 comparison of the lands mortgaged with Exhibit 2 to this answer.

There were other lands which had not been disposed of and were not embraced in said mortgage, but which were included in the said decree of partition, namely:

| | | | |
|---|---|---|---|
| Absalom Reives, | 738 acres, | Harris | county. |
| Thomas Choate, | 1,100 " | " | " |
| I. A. Veatch, | 981 " | Hardin | " |
| Joseph Doane, | 876 " | Johnson | " |

All of which were decreed to other devisees of said Morgan, as will appear by said decree, and 320 acres, A. R. Edmonson, Bexar county, decreed to this defendant in said partition.

David Middleton, 1,476 acres, Harris county, sold by decree of the district court to pay the expenses of the partition of said estate.

A tract of 640 acres, David Middleton, in Uvalde county, which was not in the inventory and not known to defendant until about the year 1880, having been discovered by defendant and supposed to belong to said Morgan's estate, was sold by defendant to pay the claims remaining due by the estate for expenses of administration at $1.35 per acre, less ten per cent., and the proceeds so applied as shown in said Exhibit No. 6. The purchasers requiring the signatures of the devisees to their conveyance, this defendant wrote to the said complainant herein explaining the facts, and she executed conveyance to the said purchasers, having received therefor
80 thirty dollars of the purchase-money.

This defendant says that the said executors made exhibit in and to the said district court of Harris county in said suit for partition, which showed fully the exact amount and kind of property that had come into their hands belonging to said estate and how the same had been administered, so far as administration had been made, and the disposition made of same, so far as disposed of, and defendant refers thereto and to the said decree showing such exhibit and accounting by the executors and based thereon, and showing also the distribution and partition of said estate made by the decree of said court, and that the further Exhibit No. 6, now filed with this answer, shows fully all further facts of said administration.

Defendant further says that he annexed to his answer as part thereof Exhibit No. 7, which shows all sales and receipts by him of and from the lands so decreed to defendant in said partition and the actual cash payments made by him, so far as remembered, connected with said lands since defendant's purchase thereof. Defendant has

derived no other revenues from any of said lands, and defendant has given much of his personal time and attention to said lands.

This defendant annexes hereto as part of his answer, as Ex-
81 hibit No. 8, the original of the note executed by the said complainant and her said husband for which said mortgage and trust deed was given as security, & showing the same to bear interest at the rate of twelve per cent. per annum; and he alleges, further, that said mortgage and trust deed represented the said complainant as the owner of the equal undivsded one-seventh of the lands set forth therein, and so conveyed and mortgaged the same, and this defendant became, as aforesaid, the purchaser thereof, whereas the said James M. Lee was the owner of the equal one-eighth of all said lands, and this defendant became the purchaser thereof from him as hereinbefore shown, and is the owner thereof, not in right of the purchase at such trust sale, but from said Lee.

Defendant further says that the rate of interest commonly paid in Texas for the loan of money in the year 1872 and for years thereafter upon any such security as said lands was ten & twelve per cent.; that the rate of interest paid by defendant for the money borrowed by him to make said purchase was ten per cent. per annum.

And this defendant claims all benefit and advantage of all said facts in the consideration of this cause.

This defendant claims and pleads his title and right to all
and singular the said lands as so purchased by him and
82 as so obtained under said decree of partition in virtue of said purchase, made lawfully and in good faith and without fraud, wrong, or injury of any kind to said complainant, and that said purchase was so made at the time without objection and with the actual knowledge and consent of the husband of said complainant, her lawful agent and representative therein, and, as defendant believes and alleges, of complainant; also on information from her said husband at the time.

And defendant further pleads and alleges that said complainant, from the date of said purchase thenceforward, acquisced therein and recognized, ratified, rnd approved the right and title thereby of this defendant, and failed to make objection, demand, or claim of any kind to or against this defendant for more than ten years, during which time very great changes have taken place in the condition of the country and in the value of said property, which, through the preservation thereof and attention to the same by defendant and by his payment of all taxes thereon and the disbursements made by him, has appreciated in value, and complainant is estopped in equity and good conscience from all claims therefor; and defendant pleads such acquiescence, laches, and estoppel, and
also pleads and sets up the bar of any action on the part of
83 complainant of the laws of limitation of this State; and defendant also alleges and pleads the entire neglect and failure, at any time or in her bill herein, of complainant to tender and do equity in this behalf.

And defendant submits to the court that as to all matters connected with the administration of the estate of said James Morgan,

or growing out of or connected therewith, the other heirs or devisees of said Morgan are necessary parties, and that this court cannot take cognizance thereof in this suit.

And defendant submits that complainant has not by her bill shown any case in equity, or one entitling her to proceed against defendant in this honorable court, and he prays all benefit and advantage herein of a demurrer to said bill.

This defendant denies all and all manner of fraud and wrong charged in said bill, without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this hon-
84 orable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

H. F. GILLETTE.

BALLINGER, MOTT & TERRY,
*Counsel for Def't.*

UNITED STATES OF AMERICA, *Eastern District of Texas:*

On this day, within the city of Galveston and the said eastern district of Texas, before me personally appeared Henry F. Gillette and made oath that he has heard read the preceding answer by him as defendant to the bill of Fanny B. Allan, complainant, and knows the contents thereof, and that the same are true, except as to matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

H. F. GILLETTE.

Sworn to and subscribed by the said H. F. Gillette before me, the undersigned authority, at Galveston, Texas, this 31st May, A. D. 1884.

S. W. JONES,
*United States Commissioner for Eastern Dist. of Texas.*

85 Endorsements: "No. 173. Equity. Fannie D. Allen *v.* Henry F. Gillette." "Defendant's answer." "Ballinger, Mott & Terry, counsel for defendant." Filed May 31st, 1884. C. Dart, clerk."

86 EXHIBIT No. 1. Annexed to Answer of Henry F. Gillette. Filed May 31st, 1884.

*Amount Due by Morgan Estate at His Death and Paid by His Executors.*

| | | | | | |
|---|---|---|---|---|---|
| 1866. | | | | | |
| May 13. | Wm. Sympkins, for making coffin, &c. | | | 35 00 | |
| " 23. | Chas. Scorriza, for tug for family to attend funeral | | | 25 00 | |
| | J. E. Schrimpt, ass't in burial | | | 4 10 | |
| | Peter Hanson, digging grave, &c. | | | 12 00 | |
| | | | | | 76 10 |
| | Hutchings & Sealy, note | 1,416 67 | | | |
| | Interest | 357 30 | | | |
| | | | | 1,773 97 | |
| | S. D. Page | | | 13 50 | |
| | A. P. Thompson | | | 10 00 | |
| | J. R. Morris | | | 54 66 | |
| | George L. Davidson | | | 10 00 | |
| | Wm. Mason, note | 450 | | | |
| | | 435 75 | | | |
| | | | | 885 75 | |
| | | | | | 2,747 88 |
| | Briggs & Yard, note | 302 14 | | | |
| | Interest | 104 02 | | | |
| | | | | 406 16 | |
| | A. P. Thompson, note | 115 | | | |
| | Interest | 44 58 | | | |
| | | | | 159 58 | |
| | John G. Duffield, note | 1,000 | | | |
| | Interest | 386 | | | |
| | | | | 1,386 00 | |
| | Mrs. Wm. Mason, note | 2,166 | | | |
| | Interest | 505 40 | | | |
| | | | | 2,671 40 | |
| | J. P. Davis, note | 145 55 | | | |
| | Interest | 106 82 | | | |
| | | | | 252 37 | |
| | M. A. Levy, note | 175 00 | | | |
| | Interest | 53 | | | |
| | | | | 228 | |
| | M. A. Levy, note | 340 | | | |
| | Interest | 125 35 | | | |
| | | | | 429 35 | |
| | | | | | 5,532 86 |
| | M. A. Levy, acc't | | | 4 88 | |
| | Wm. Thompson, Lynchburg, note | 254 08 | | | |
| | Interest | 230 05 | | | |
| | | | | 484 13 | |
| | Wm. Thompson, account | | | 19 65 | |
| | | | | | 508 66 |
| 87 | John Collins, note | 14 00 | | | |
| | Interest | 5 65 | | | |
| | | | | 19 65 | |
| | Waters Davis, note | 49 46 | | | |
| | Interest | 30 54 | | | |
| | | | | 80 00 | |
| | Dr. W. D. Drysdale, note | 1,000 | | | |
| | Interest | 1,176 65 | | | |
| | | | | 2,176 65 | |
| | J. Buckley, note | 432 39 | | | |
| | Interest | 87 61 | | 520 00 | |
| | | | | | 2,796 30 |
| | Nat. Bailey, acc't | 126 95 | | | |
| | Int. | 41 77 | | | |
| | | | | 168 72 | |

| 1866. | | | | | |
|---|---|---|---|---|---|
| May 23. | Dr. McCraven | 150 00 | | | |
| | Cost, court | 26 15 | | | |
| | | | | 176 15 | |
| | Gusselman & Bro., note | 84 84 | | | |
| | Interest | 49 16 | | | |
| | | | | 134 00 | |
| | Mrs. Eliza Mason, note | 1,410 | | | |
| | Interest | 263 60 | | | |
| | | | | 1,673 60 | |
| | Labadie & Barstow % | 45 50 | | | |
| | Interest | 14 86 | | | |
| | | | | 60 36 | |
| | W. N. H. Smith, note given Jan'ry 5, 1850, with int. to Jan'ry 5, 1869 | ---- | | 10,520 68 | |
| | | | | | 12,733 51 |
| | | | | | 24,395 31 |

The foregoing Exhibit No. 1 endorsed: No. 173. Equity. Exhibit No. 1, annexed to answer of Henry F. Gillette, showing indebtedness of James Morgan. Ballenger, Mott & Terry, counsel for deft'. Filed May 31st, 1884. C. Dart, clerk.

EXHIBIT No. 2.—*Showing Sales of Lands of the Estate of James Morgan. Filed May* 31, 1884.

| *Date of Sale.* | | | |
|---|---|---|---|
| | *Harris County.* | | |
| | Johnson Hunter survey— | | |
| Jan'ry 23, 1869 | Sold James Tompkins 350 a. for | 3,000 | Taken for note. |
| July 20, " | " Mrs. Eliza Mason 91 " | 1,360 | " " |
| " " | " Jeremiah Buckley 33 " | 660 | " " |
| 88 | | | |
| March 14, 1870 | Sold J. P. Davie 23½ " | 305 | |
| " " | " Thos. Henderson 35 " | 525 | The last pay't, Jan'ry 11th, 1879, $259. |
| Oc'r, 1876 | " H. Prunier, Toby scrip, 640 a. | 425 | ⅓ cash, bal. 1 year. |
| | *Waller County.* | | |
| | Locey Piersoll ⅓ league— | | |
| Nov. 26, 1870 | Sold Chas. W. & Wm. Randall 200 a. | 500 | In 3 yearly pay'ts. |
| Jan'ry 7, 1871 | " Thos. Ray, 200 a. | 500 | " " |
| Jan'ry 1st, 1872 | " P. M. Weber 100 a., No. 2 & 15 | 300 | " " |
| | Weber, failing to pay up for the land, left it; it was sold for taxes, redeemed by the executor, and sold in Feb'y 20, 1884, to Joseph Attaway | 250 00 | Cash. |
| Jan'ry 1st, 1872 | Sold J. B. Cato 100 a. | 300 | Cash. |
| Oct. 1st, 1873 | " Thos. Ballard, No. 13, 44¾ a. | 100 | " |
| | *Liberty County.* | | |
| Jan'ry 20, 1871 | Jordan West league to Frank Hamner, Ohio | 2,858 | 1,000 cash, bal. six months. |
| | Spencer Kirkham league— | | |
| Sept. 1st, 1868 | Sold Dr. Harrison 100 a. for | 75 | |
| | For surveying & establishing lines & corners, &c. | | |
| " 1868 | " Erasmus Powell 100 a. | 100 | Payable 1, 2, & 3 years. |
| " " | " George Powell 112 a. | 112 | " " " |
| " " | " J. B. Turner 100 a. | 200 | " " " |
| Jan'ry 2, 1871 | " A. D. McGinnis 100 a., improved place | 200 | Cash. |

| | | | | |
|---|---|---|---|---|
| June 8th, 1874 | " | W. C. Jefferson 60 a. | 120 | |
| | | This was given up by him and afterwards sold to E. J. Isaack, March, 1880, for | 120 | Pay't, 1, 2, & 3 years. |
| | | Stephen Nicholson ⅓ league— | | |
| Sept. 1st, 1868 | Sold | J. L. Hansom 100 a. | 100 | " 1, 2, & 3 years. |
| Dec'r 7, 1870 | " | " 100 a. | 150 | " " " |
| Febr'y 1, 1871 | Sold | F. M. Wills 50 a. | 100 | Payable 1, 2, & 3 years. |
| " 1873 | " | Jacob Cole 264 a. | 264 | $100 cash, bal. in 1 year. |
| | | J. R. Faulk ⅓ league— | | |
| Sept. 5, 1868 | " | John Tarkington 100 a. | 100 | Payable 1, 2, & 3 years. |
| " 25, " | " | Wm. West 100 a. | 75 | Cash. |
| Jan'ry 1, 1873 | " | F. L. Harrell 100 a. | 200 | ⅓ cash, bal. 1 & 2 years. |
| 89 | | | | |
| Oc'r 7, 1876 | " | Wm. West 78⅔ a. | 86 50 | Cash. |
| | | *Polk County.* | | |
| | | Wm. Pace league— | | |
| Sep'r 18, 1869 | Sold | J. Bradford 100 a. | 200 | Payable ⅓ cash, bal. 1 & 2 yr-. |
| Oc'r 15, 1869 | | J. R. Peters 125 a. | 250 | |
| | | Peters paid nothing, gave up the land, which was subsequently sold to T. F. Garner, Sep'r 12, 1876 | 441 | 200 cash & note for 241; in 1879 paid 136.61, balance unpaid. |
| July 23, 1871 | Sold | John Victory 110 a. | 310 | ⅓ cash, bal. 1 yr. |
| " " | " | W. H. Shotwell 57½ | 115 | Payable in 6 m. |
| Feb'ry 17, 1884 | " | Dav. Thomason 100 a. | 130 | Cash and note for $480. |
| | | Joseph Scates league— | | |
| Jan'ry 20, 1870 | Sold | J. W. Leggett, improved, 200 | 600 | Pay. 1, 2, & 3 yrs. |
| " " | " | B. F. Watts 100 | 300 | " " |
| " " | " | J. F. Peters 100 | 300 | " " |
| " " | " | Wm. Hinsom 100 | 300 | " " |

## EXHIBIT No. 2—Continued.

| *Date of Sale.* | | | | |
|---|---|---|---|---|
| | | *Tyler County.* | | |
| | | J. J. Blackman league— | | |
| Jan'y, | 1871 | Sold Chambliss & Tucker 400 a. | 400 | Cash. |
| Dec'r | 2, 1872 | " John Lawson 200 a. | 200 | |
| " | " | " Jas. Toler 160 a. | 160 | |
| " | 12, " | " E. B. Hooks 100 a. | 100 | |
| March | 1, 1884 | " E. R. Smith 139 a. | 278 | 100 cash, bal. 1 & 2 yr-. |
| | | Burrell Blackman league-- | | |
| Sep'r | 6, 1871 | Sold Harrell Arnold 121¼ a. | 121 25 | Cash. |
| Nov. | 7, " | " Eliza Kirkland 98 a. *a.* | 98 | Cash. |
| Dec'r | 2, 1872 | " M. S. Isabel 350 a. | 350 | Cash. |
| " | " | " Milton Park 161 a. | 161 | Cash. |
| | | Ben. Lanier survey— | | |
| Feb'ry | 1, 1871 | N. R. Watkins 176 a. | 352 | Payable ⅓ cash, bal. 1 & 2 yrs. |
| | | *Jasper County.* | | |
| 90 | | McDonald league— | | |
| Feb'ry, | 1869 | Sold W. N. H. Smith 4,428 a. | 4,428 | Turned on note. |
| | | *Bosque County.* | | |
| | | C. C. Lupton survey— | | |
| | 1869 | Sold Hutchings & Sealy 1,476 a. | 1,200 | Turned on note. |
| | | L. R. Owen survey— | | |
| " | " | Sold Hutchings & Sealy 1,280 a. | 900 | Turned on note. |
| | | *Uvalde County.* | | |
| | | John Glover survey— | | |

| | | | |
|---|---|---|---|
| June, 1876 | Sold Gen. John Baylor 1,476 | 738 | Sold by Herndon, cash. |
| May 3, 1883 | " Dav. Middleton survey, 640 | 777 60 | Sold by Wm. Benson. |
| | *Bexar County.* | | |
| | T. R. Edmondson survey— | | |
| Oc'r 4th, 1869 | Sold —— Cagnion 320 | 320 | Cash. |
| | *Montgomery County.* | | |
| | Augustus V. Sharpe survey— | | |
| March 14, 1870 | Sold to —— Dickinson 1,476 | 738 | Cash, sold by J. E. Foster. |
| | *Harris County.* | | |
| April, 1879 | House & lots in Houston sold to W. D. Cleveland | 2,000 | To pay Drasdale note. |
| | Wren house & lot in Lynchburg, sold to F. Sandew | 800 | Paid during the year sold. |
| | Dav. Middleton survey at public sale, by order of the court, for 1,476 | 358 | To pay partitioners of the estate. |

The foregoing Exhibit No. 2 endorsed: "Ch., 173. Exhibit No. 2, annexed to answer of Henry F. Gillette, showing sales of land of the estate of Jas. Morgan. Ballinger, Mott & Terry, counsel for defendant. Filed May 31, '84. C. Dart, clerk."

91 EXHIBIT No. 3. No. 2D.

*Amount of Money Furnished the Morgan Heirs in the Administration of the Morgan Estate.*

| | | | | |
|---|---|---|---|---|
| 1886. | | | | |
| July 4. | Children of Kos. Morgan | 202 | 50 | |
| Aug. 25. | Henry Allen & wife for children | 585 | | |
| Sep'r. 3. | " " " | 106 | | |
| Oc'r 1st. | Do. do. | 65 | | |
| " 20. | Do. do. | 85 | | |
| 1867. | | | | |
| April 1st. | Do. do. | 100 | | |
| Aug. 10. | Fannie B. Allen | 30 | | |
| " 20. | Order on White | 12 | | |
| 1868. | | | | |
| April 7. | Do. do. | 10 | | |
| Oc'r 5. | Tuition Ophelia & Maria Morgan | 21 | | |
| 1870. | | | | |
| Feb'y 14. | Sent to Frankfort, Ky., for children | 150 | 00 | L. J. Cox. |
| May 2. | Fannie B. Allan to F. D. Allan | 50 | 00 | |
| 1871. | | | | |
| April 1st. | To Fannie B. Allan for Chas. Morgan | 50 | 00 | |
| " 3. | Sent to Frankfort for children | 350 | 00 | L. J. Cox. |
| Feb'y 8. | Gave Chas. W. Morgan | 50 | 00 | |
| 1872. | | | | |
| May 18. | " " " | 20 | 00 | |
| Feb'y 5. | Do. do. do. | 300 | | L. J. Cox. |
| March 5. | Gave Chas. Morgan, throu- Mrs. F. D. Allen | 60 | | |
| May 6. | Fannie B. Allen | 100 | | |
| Dec'r 9. | Sent to Frankfort, Ky. | 300 | | L. J. Cox. |
| 1873. | | | | |
| May 10. | Sent " " tuition, Mary & Ophelia | 218 | | St. Mary's school. |
| 1874. | | | | |
| June 1st. | Sent to Ky. for children | 151 | 12 | |
| 1875. | | | | |
| May 12. | Do. do. d'f't & exchange | 50 | 25 | |
| Dec'r 1st. | " " " " | 150 | 00 | |
| | | 3,216 | 27 | |

92 The foregoing Exhibit No. 3 endorsed as follows: "No. 173. Exhibit No. 3 annexed to answer of Henry F. Gillette, showing payments to Morgan children, &c." "Ballinger, Mott & Terry, counsel for def't." Filed May 31, 1884. C. Dart, clerk.

EXHIBIT No. 4.

In District Court of Harris County. Spring Term, 1877.

C. C. LEWIS
*vs.*
H. F. GILLETTE, GEORGE BALL, as Executors of James Morgan, and against Fanny Bell Allen, Charles W. P. Morgan, Mary Morgan, Ophelia Morgan, Maria Morgan, Nellie Morgan, and Ellen Lee. } 9544.

On the 25th of April, 1877, this cause came on again for hearing, when the plaintiff and the executors appeared by attorney and also intervener, W. N. H. Smith, and defendants, Mary Morgan, Maria

Morgan, Ophelia Morgan, Nellie Morgan, and Ellen Lee, appeared by W. H. Crank, Esq., an attorney of this court, as their special guardian, duly appointed and qualified to represent their interest in this suit; and the parties announcing ready, then was heard and examined the account current and vouchers of said executors and the proof introduced by the parties, from all which it appears that said executors have sold of the lands of said estate twenty-one thousand and six hundred and sixty-three $\frac{7}{10}$ acres for the
93 sum of (including the wharf at Lynchburg) twenty-nine thousand three hundred and eighty-one dollars and $\frac{75}{100}$, say, $29,381.75, and have received for interest, rents, and all other accounts, including debts due the testator, two thousand and fifty-six dollars, making a total of $31,437.75;

| | | |
|---|---|---|
| Of which amount it appears they have received, in cash, eighteen thousand and fifty dollars and fifty cents, say, | 18,050 | 50 |
| And in notes for land (not including interest due on them), which they now hold and are unpaid, and which are specified in their account, two thousand and four hundred and forty-one dollars $\frac{51}{100}$, say | 2,441 | 51 |
| And in debts of the testator, for which they have sold lands in payment, ten thousand nine hundred and forty-five dollars and $\frac{74}{100}$, say | 10,945 | 74 |
| | 31,437 | 75 |
| And it further appears that said executors are also chargeable with the following receipts of money for sales of land which have been overlooked in making up their account, say, for amount received of Nicholson, say | 165 | 00 |
| Of Thomas Henderson, one hundred and seventy-one $\frac{30}{100}$ dollars | 171 | 30 |
| Of P. H. Webber, thirty dollars | 30 | 00 |
| Of A. O. Maginnis, twenty-six dollars | 26 | 00 |
| Of F. M. Garner, one hundred & ninety-one $\frac{11}{100}$ dollars | 191 | 11 |
| 94 And of Coignan, ninety-nine dollars | 99 | 00 |
| And that they are charged also for the value of gold over currency, as admitted, the sum of three hundred and sixty dollars | 360 | 00 |
| | 1,042 | 41 |
| To which add cash received, as per their account above, say | 18,050 | 50 |
| Making gross cash receipts | 19,092 | 91 |

Nineteen thousand and ninety-two dollars and $\frac{91}{100}$, from which is to be deducted three hundred dollars, which it appears properly belonged to Caroline Morgan, and which was paid her by said executors, leaves the actual amount of cash with which said executors are chargeable in this settlement eighteen thousand seven hundred and ninety-two dollars and ninety-one cents, $18,792.91.

It further appears from vouchers and proof, to the satisfaction of the court, that said executors have paid taxes and expenses of administration three thousand nine hundred and fifty-one $\frac{20}{100}$ ---------- 3,951 20

And have discharged debts of the testator by sale of lands in payment to amount of ten thousand nine hundred and forty-five dollars $\frac{74}{100}$, say ---------- 10,945 74

And have paid on his debts, in cash, ten thousand eight hundred thirty-five dollars and sixty cents, say ---------- 10,835 60

And have paid to the children of Kosciusko Morgan, legatee, two thousand eight hundred and seventy-five dollars and ninety-three cents, from which is to be deducted three hundred dollars, which properly
95 belonged to Caroline Morgan, say ---------- 2,575 93

And have on hand the notes aforesaid for land uncollected two thousand four hundred and forty-one $\frac{51}{100}$ dollars, principal ---------- 2,441 51

And cash on hand, as per this statement of their account, fourteen hundred and thirty $\frac{18}{100}$ dollars ---------- 1,430 18

32,180 16

The account of the executors, as thus restated, is established, approved, and confirmed. Of the moneys advanced by the executors to the legatee it appears that Charles W. P. Morgan was the beneficiary of one hundred and thirty dollars and the plaintiff, as purchaser of his interest in the estate, will stand charged in the partition hereafter ordered with that sum as so much of his part already received.

And it appearing that the defendants, Fannie Bell, May, Ophelia, Maria, and Nettie, were the beneficiaries of the remainder of said moneys so advanced, they and the vendors of their interest, if heretofore sold, will respectively stand charged in the partition hereafter ordered with one-fifth of the balance, which is four hundred and eighty-nine dollars and eighteen cents ($489.18) each, as so much of their part by them heretofore received, respectively.

It is further ordered that said executors be allowed to retain of said estate as compensation for their care and services in its
96 management five per cent. on eighteen thousand seven hundred and ninety dollars and $\frac{91}{100}$ which they received in cash, say, nine hundred and thirty-nine dollars and $\frac{64}{100}$, 939.64.

And five per cent. on fourteen thousand seven hundred and eighty-six dollars and eighty cents cash paid out for said estate is seven hundred and thirty-nine $\frac{34}{100}$ dollars, 739.34.

And it further appearing that this allowance is not sufficient compensation for the services rendered, and that five per cent. on the amount of debts that are discharged in land will be reasonable and fair, it is adjudged that said executors be allowed that per centum on that sum, which makes five hundred and forty-one dollars $\frac{78}{100}$, 541.78.

And W. H. Crank, Esq., as special guardian of defendants, May,

Maria, Ophelia, and Nellie Morgan, is allowed a fee of three hundred dollars for his services in this behalf already and hereafter to be rendered, and one-fourth of said sum is here made a charge on the interest of each of the above-named wards, as the same may hereafter be allotted to them on partition.

The said W. H. Crank, on motion of his attorney, has leave to withdraw his plea of intervention, heretofore filed in this cause, without prejudice, and the same is withdrawn.

And it appearing that the executors have not sufficient moneys in hand, to pay the compensation allowed them and other
97 charges that have accrued against said trust while in their hands, they will therefore be allowed to retain in hands for collection and further settlement the notes for land hereinbefore named, and to enable them finally to close their trust with least expense to the trust fund. When said notes shall be collected this cause will remain on the docket and the parties interested be considered in court for the purpose only of final statement of the executors and approval of same.

And it further appearing that there remains of said estate the following lands, to wit:

In Harris county:

60 acres known as Orange Grove.
1,067 acres (unsold) of the Johnson Hunter survey.
731 acres of the Lacey Pearsoll survey.
58½ " of David Middleton grant.
137 " of W. P. Harris grant.
442½ " R. Pearsall survey.
472 " Johnson Hunter survey.
3,558 " Edward King survey.
738 " undivided of Absolon Reeves survey.
640 " Toby script.

Lots 1 & 2 in block four, 4, in Harrisburg, to which no title can be established.

1,100 acres of Thomas Choate grant.

In Liberty county:

1,700 acres unsold of Stephen Nicholson grant.
98 937 acres of Henry White survey.
3,881 " (unsold) of Spencer Kirkham grant.
1,107 acres Meredith Duncan grant.
1,810 " (unsold) of J. R. Faulk grant.
1,600 " of Christian Smith grant.

In Polk county:

2,214 acres of Elizabeth Johnson survey.
2,858 " (unsold) of William Pace survey.
3,126 " " of Joseph Scates' grant.

In Tyler county:

3,568 acres, unsold, of J. J. Blackman grant.

3,696 acres, unsold, B. Blackburn grant.
2,082 acres " Benjamin Lanier grant.
1,654 acres of J. B. Wood grant.

In Hardin county:

1,850 acres of Charles A. Felder grant.
981 " " J. A. Veatch grant.

In Johnson or Hood county:

876 acres, unsold, of Jos. Doan grant.

In Uvalde county:

640 acres of Walter Wynne grant.
960 " " David T. Jones' grant.

Bexar county:

320 acres granted to Thomas R. Edmondson.
99 2,302 " " " Jacob F. Winfrey.

In Erath county:

700 acres of James A. Yeoman grant—

It is ordered that Robert Lockhart, E. C. Stockton, and J. C. C. Winch be, and they are hereby, appointed commissioners to ascertain the quality and value of the above-named lands and partition and allot them (taking into consideration the advancements heretofore received and herein charged to Charles Morgan, Fannie Bell, May, Ophelia, Maria, and Nellie) equally, according to quantity and value, into seven (7) parts, and then allot to the plaintiff, C. C. Lewis, one part and to H. F. Gillette one part, who, it appears, has purchased and owns the interest of Fannie Allen, May, Ophelia, Maria, Nettie and Ellen Lee, one part each, specifying with certainty such tracts or parts of tracts as may be allotted and set off to each, and, the better to enable them to perform this service, the executors are ordered to deliver into the hands of the clerk of this court all the title papers in their hands and take his receipt therefor, which title papers will remain on file with the papers of this cause until said partition shall have been made and confirmed.

100 And said commissioners are hereby authorized to employ surveyors and have surveyed and platted any of said tracts or parts of tracts that they may deem necessary in making said partition and report.

And they will make report of said partition under oath to the next term of this court.

It is further adjudged that costs of this suit to this time be paid by the executors as a personal charge on them.

And the question of allowance of an attorney's fee for services in this behalf is reserved to be considered by the court as an item in the final account of the executors; the charges, in the opinion of the court, is a proper charge against the trust funds, but the amount of the fee can better be determined after the same shall have been fully performed and evidence heard as to the reasonable value thereof.

Should the executors have funds in their hands for the purpose, then they will pay the allowance here made to William H. Crank, as special guardian, to be a charge against the interests of the parties he represents.

STATE OF TEXAS, *County of Harris:*

I, James Burke, district court clerk for Harris county, Texas, hereby certify that the foregoing is a true copy from the minutes of said court in the above-entitled and numbered cause as appears
101 of record in my office, Book "R," pages 131, 132, 133, & 134, minutes of district court of Harris county, Texas.

To certify which I hereto set my hand and the seal of said court, at office in Houston, this 11th day of April, A. D. 1884.

[SEAL.] J. BURKE,
*C. D. C., H. Co.,*
By F. M. POLAND, *Dep'ty.*

Endorsements upon foregoing Exhibit No. 4: "No. 9544." "C. C. Lewis *vs.* H. F. Gillette *et als.*" "Copy of decree." "$5.00." April 25, '77. "Ch., 173." Exhibit No. 4. Annexed to answer of Henry F. Gillett. "Ballinger, Mott & Terry, counsel for def't. Filed May 31st, 1884. C. Dart, clerk."

EXHIBIT No. 5.

*Leave Granted Commissioners to Amend Report to Correct Clerical Errors.*

MONDAY, *Dec'r 10th*, 1877.

Court met pursuant to adjournment.

Minutes read and approved.

C. C. LEWIS
*vs.*
H. F. GILLETT & GEORGE BALL, as Executors of James Morgan, and against Fanny Bell Allan, Chas. W. P. Mor-Morgan, May Morgan, Ophelia Morgan, Maria Morgan, Nellie Morgan, & Ellen Lee. } 9544.

This cause on this day came on to be further heard upon
102 the report of R. Lockhart, Sr., and J. C. C. Winch, commissioners of partition, appointed by decree of March term, 1877, to divide the lands in controversy between the parties entitled thereto, which report was filed on the 5th day of December, 1877; and it appearing to the court said partition, as reported by said commissioners, was made in conformity with law, and that the same is just & fair, and there being no objection to the same by any of the parties in interest, the court doth ratify and confirm the same, and, in accordance with said report and partition, doth adjudge, order, and decree—

I. That Ellen Lee have and recover of and from the other parties to this suit and that there be, and is hereby, vested in her the fol-

lowing lands allotted her by said commissioners of partition, and that all title thereto be divested out of the other parties to this suit, to wit: 3,858 acres, more or less, being the entire unsold part of the Edward King league, situated on the waters of the San Jacinto river, in Harris and Liberty counties; also 1,107 acres out of the east corner of the Meredeth Duncan league, situated on Cedar bayou, in Harris and Liberty counties; for metes and bounds, see deed; also 1,100 acres, an undivided interest in the Thos. Choate league, situated on Turkey & Clear creek, in Harris county;
103 also 2 lots of 48 acres each, a part of the Locey Pearsoll one-third league, in Grimes county; said survey has been divided off into small tracts and numbered on the map from one to twenty-four, inclusive; said map is on file with the papers of this cause and is referred to; said two lots are numbered four (4) & six (6); also two lots of nineteen & three-fourths (19¾) acres, twenty (20) acres, number fourteen (14) and number fifteen (15), in the Johnson Hunter league, situated on Galveston Bay, in Harris county, a part of said league having been surveyed off into small tracts and numbered from one (1) to eighteen (18), inclusive, on the map on file in the papers of this cause, and which is here referred to; also two hundred & forty-five (245) acres, being lots numbers twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), in the Locey Pearsall one-third league, in Grimes county, which we value at four hundred and eighty-nine & $\frac{18}{100}$ dollars ($489.18), and partitioned and set apart to the said Ellen Lee to make her equal with the other heirs.

II. That Maria Morgan have and recover of and from the other parties to this suit and that there be, and is hereby, vested in her the following lands allotted to her by said commissioners of partition, and that all title therein be divested out of the other
104 parties to this suit, to wit: Three thousand eight hundred and eighty-one (3,881) acres, more or less, being the entire unsold part of the Spencer Kirkham league, situated in Liberty county; also six hundred & forty (640) acres granted to James Morgan, assignee of Walter Wynne, by letter patent No. three hundred and sixty (360), volume two (2), known as survey number one hundred and forty-one (141), in section —, situated in Uvalde county; also four hundred and seventy-two acres (472), part of the Johnson Hunter league, situated on Galveston Bay, Harris county, as described on map on file in the papers of this cause and here referred to; also one hundred (100) acres, part of same league, marked on map as lot number seven (7); also sixty-seven (67) acres, part of same league, marked on map as Orange Grove; also two (2) lots, numbers eleven (11), forty-eight $\frac{14}{100}$ ($48\frac{14}{100}$), and number twelve (12), forty-one acres (41), part of the Locey Pearsoll one-third league, situated in Grimes county.

III. That May Morgan (called Mary Morgan in said report) have and recover of and from the other parties to this suit and that there be, and is hereby, vested in her the following tracts and parcels of land allotted to her by said commissioners of petition, and that all title thereto be divested out of the other parties to this suit, to wit:

Three thousand six hundred and ninety-seven ¾ acres (3,697¾,
105 acres), more or less, being the entire unsold part of the Burrell Blackman league, situated in Tyler county; also nine hundred and sixty (960) acres granted to James Morgan, assignee of David J. Jones, by letters patent number three hundred and sixty-one (361), volume two (2), known as survey number one hundred and forty-four (144), situated in Uvalde county; also five hundred & ninety-four (594) acres, part of the Johnson Hunter league, situated on Galveston Bay, in Harris county, described on map on file in the papers of this cause; also thirty-five (35) acres, part of same league, marked on map as lot number six (6); also two (2) lots, number nine (9), sixty $\frac{83}{100}$ ($60\frac{83}{100}$) acres, lot number seventeen (17), fifty acres, part of the Locey Pearsoll one-third of a league, in Grimes county. (See map on file in this cause.)

IV. That Henry F. Gillette do have and recover of and from the other parties to this suit and that there be, and is hereby, vested in him the following tracts and parcels of land allotted to him by said commissioners of partition, and that all title thereto be divested out of the other parties to this suit, to wit: Two thousand and eighty-two acres, more or less, being the entire unsold part of two thousand two hundred and fifty-eight (2,258) acres of the Benjamin
106 Lanier league, situated in Tyler county.

Also nine hundred and thirty-seven (937) acres, more or less, being the entire unsold part of the Henry White one-fourth league, situated in Liberty county; also seven hundred (700) acres, an undivided interest in the James Yeoman one-third league, situated in Erath county; also two thousand three hundred and two & ½ acres (2,302½), an undivided one-half interest in the Jacob F. Winfrey league and labor survey, situated on the west bank of the Nueces, in Edwards & Crockett counties; also three hundred & twenty (320) acres granted to Thomas R. Edmondson, patent number three hundred & sixty-three (363), volume 6, survey No. 207, in section number five (5), situated in Bexar county; also four hundred and forty-two ½ acres (442½), being the south part of the Richard Pearsol one-third league grant, near Galveston Bay, in Harris county; also one hundred and seven (107) acres, a part of the W. C. Harris league on Galveston bay, Harris county; for metes and bounds see deed recorded in Book W, page- 615 and 616; also two (2) lots in the Johnson Hunter league, number eleven (11), twenty-two acres (22), and number twelve (12), twenty-one and ½ acres (21½), as per map on file in the papers of this cause.

Also one hundred acres (100) in same survey, being marked
107 on map as lot number seventeen (17); also forty-three ½ (43½) acres, a part of the Locey Pearsoll one-third league, in Grimes county, marked on map as lot number sixteen (16).

V. That Ophelia Morgan have and recover of and from the other parties to this suit and that there be, and is hereby, vested in her the following tracts of land allotted to her by said commissioners of partition, and that all title to the same be divested out of the other parties to this suit, to wit: Two thousand two hundred & fourteen acres, being the southeast half of the Elizabeth Johnson league, in

Polk county, the division line running diagonally through the survey from the north to the south corner.

Also sixteen hundred acres (1,600), more or less, being the entire unsold part of seventeen hundred (1,700) acres out of the Christian Smith league, in Polk and Liberty counties; also six hundred and forty (640) acres, patented to James Morgan (assignee), Toby scrip No. 391, patent number 957, volume two (2), situated south of Cypress creek, in Harris county; also nine hundred and eighty-one (981) acres, a part of the John A. Veach league, on the waters of Pine Island bayou, in Hardin county; also two (2) lots, part of the Johnson Hunter league, in Harris county, lot number ten (10), twenty-nine (29) acres, and lot number eighteen (18), one
108 hundred (100) acres, as per map on file in the papers of this cause; also fifty-eight & ½ (58½) acres, part of the David Middleton $2\frac{940400}{1000000}$ square varas survey, situated north of Cypress creek. See deed.

VI. That Nellie Morgan, called Nettie Morgan in said report, have and recover of and from the other parties to this suit, and that there be, and is hereby, vested in her the following tracts and parcels of land allotted to her by said commissioners of partition, and that all title to the same be divested out of the other parties to this suit, to wit: Sixteen hundred and fifty-four (1,654) acres, more or less, being the entire unsold part of half of the James B. Wood league, situated in Polk & Tyler counties; also three thousand one hundred & twenty-seven (3,127) acres, more or less, being the entire unsold part of the Joseph Scates league, in Polk county; also seven hundred and thirty-eight (738) acres, an undivided one-half interest in the Absalom Reeves one-third league, situated east of the San Jacinto, in Harris county; also two (2) lots—number one (1), twenty-three & ¾ (23¾) acres; number thirteen (13), twenty-one (21) acres—a part of the Johnson Hunter league, on Galveston Bay, in Harris county, as per map on file in the papers of this cause; also ninety-five & ⅓ (95⅓) acres, being lot number three (3), part of the Locey Pearsoll survey of one-third of a league, in Grimes county, as per map on file in the papers of this cause.

109 VII. That C. C. Lewis have and recover of and from the other parties to this suit, and that there be, and is hereby, vested in him the following tracts and parcels of land allotted to him by said commissioners of partition, and that all title thereto be divested out of the other parties to this suit, to wit: Two thousand eight hundred and fifty-eight ½ (8,858½) acres, more or less, being the entire unsold part of the Wm. Pace league, situated near Swartwout, in Polk county; also eighteen hundred and ten (1,810) acres, more or less, being the entire unsold part of the J. A. Faulk league, in Liberty county; also seventeen hundred (1,700) acres, more or less, being the entire unsold part of the Stephen Nicholson league, in Liberty county; also eight hundred and seventy-six (876) acres off the west side of the Joseph Doane one-third of a league patented to James Morgan, assignee, situated in Hood county; also two (2) lots—number seven (7), containing seventy & $\frac{87}{100}$ ($70\frac{87}{100}$) acres, and number eight (8), containing fifty (50) acres—part of the Locey

Pearsoll one-third of a league, in Grimes county, which is valued at three hundred & fifty-nine and $\frac{18}{100}$ dollars ($359.18); also lot number ten (10), seventy-seven and $\frac{1}{2}$ acres, in the Locey Pearsoll one-third league, in Grimes county; also lot two (2), twenty and $\frac{2}{3}$ acres, and lot three (3), twenty-one (21) acres, in the Johnson Hunter league, in Harris county.

110 And it is further adjudged, ordered, and decreed that H. F. Gillette, the executor of James Morgan, do proceed to sell, after due advertisement as required for sales of land under the law, on some regular sale day before the next term of this court, at the front door of the court-house of Harris county, for cash, to the highest and best bidder, the following-described tract of land, which was not partition by said commissioners and is recommended to be sold in and by their said report, to wit: The west one-third of the David Middleton league, of twenty-three (23) labors, lying and situated in Harris county, Texas, on the waters of Buffalo bayou, and make report of such sale to this court for confirmation at its next term, and out of the proceeds of said sales, after paying the expenses thereof, including the usual commission to the executor, he shall pay the costs of this suit, including costs allowed said commissioners of partition, and then for services, to wit: R. Lockhart three hundred & fifty dollars ($350), J. C. C. Winch ten (10) dollars, Alfred Isaacks fifteen dollars ($15), W. B. Cline five dollars ($5), E. Alstaten ($15.00), and W. E. Wood three dollars ($3.00), and the balance he shall pay over to the parties entitled under the report of the commissioners of partition in equal proportion, but out of the shares of the minors, Maria, May, Nelly, and Ophelia Morgan, and Ellen Lee, he

111 shall pay to W. H. Crank, special guardian of said minors, the sum of three hundred dollars, with interest thereon, the same having been allowed him for services by a former decree of this court, unless the same shall have been paid by the said H. F. Gillette, executor, out of the funds which may have come into his hands, as directed by decree entered in this cause at the March term of this court for 1877; and a lien is hereby adjudged, ordered, and decreed in favor of Wm. H. Crank, special guardian, for said sum of three hundred ($300) dollars and interest upon all of the lands allotted to said minors under and by the report of said commissioners and decreed to them in this decree, for which execution may issue; and it is further adjudged, ordered, and decreed that the maps referred to in said report of the commissioners of partition be attached to & filed with the papers of this cause, and that copies of the same be furnished to the county clerk of Harris county, or any other person interested who may demand the same for record in Harris county, or in any other county in which any of said lands may be situated; and it is further adjudged, ordered, & decreed that the costs of making this partition be paid equally by all of the parties hereto, for which execution may issue against each of said parties for his or her proportion of said costs.

112 And as to the J. J. Blackman and Charles Felder surveys recommended by said commissioners of partition to be sold, the court declines to make any order in regard thereto for the pres-

ent, and this cause is continued as to said lands for further proceedings to be had.

And it is further ordered and decreed that the sum of three hundred and fifty dollars ($350.00) be allowed R. Lockhart, Sr., one of the commissioners of partition, it appearing to the court that he has expended an unusual amount of labor and incurred various expenses in making said partition and that his services in the premises are reasonably worth said sum.

And it is further ordered and decreed that in the event that execution shall issue for the costs and charges as herein allowed and as against the minor defendants represented by W. H. Crank, special guardian, that there shall be sold of the lands allotted to Maria Morgan the lot designated as Orange Grove, out of the Johnson Hunter survey, containing sixty-seven (67) acres, in Harris county; of the lands allotted to May Morgan there shall be sold lot number six (6) in said Johnson Hunter survey, containing thirty-five (35) acres; of the lands allotted to Nellie Morgan there shall be sold lot number thirteen (13), containing twenty-one (21) acres of the Johnson Hunter survey, in Harris county; of the land allotted Ophelia Mor-
113 gan there shall be sold lot number ten (10), of twenty-nine (29) acres, of said Johnson Hunter survey; of the lands allotted to Ellen Lee there shall be sold lot number fourteen (14), of twenty (20) acres, in said JohnsonH unter survey, and any sale of lands as ordered in this decree shall be reported to this court for confirmation.

THE STATE OF TEXAS, *Harris County:*

I, J. Burke, Jr., clerk for the district court in and for said county, do hereby certify that the foregoing is a true copy of the original decree in case No. 9544, entitled C. C. Lewis *v.* H. F. Gillette *et al.*, as the same appears of record on the minutes of said court in Book "R," pages 230 to 234, under date of Dec'r 10, 1877.

Witness my hand and official seal, at office, in the city of Houston, this 9th day of April, 1879.

[SEAL.] J. BURKE, JR.,
*C. D. C., H. C.*

THE STATE OF TEXAS, *County of San Jacinto:*

The foregoing annexed decree of partition was filed for record in this office April 16th, A. D. 1879, at 4 o'clock p. m., and recorded 17 April, A. D. 1879, at 3 o'clock p. m., in Book D of Deeds, &c.,
114 pages 68, 69, 70, 71, 72, 73, 74, 75, & 76.

In witness whereof I, G. B. Byrd, county clerk of San Jacinto county, hereto subscribe my name and affix the seal of said court this 17 day of April, A. D. 1879.

[SEAL.] G. B. BYRD,
*Clerk C. C., S. J. C.*

The foregoing exhibit No. 5 endorsed as follows: "Ch., 173." "9544." "C. C. Lewis *v.* H. F. Gillette *et al.*" "Certified copy of decree of partition." Entered Dec'r 10, 1877. "Filed in my office

for record 4 o'c. p. m., April 16th, A. D. 1879." "G. B. Byrd, C. C. C., S. J. Co." "Exhibit No. 5." "Annexed to answer of Henry F. Gillette." "Ballinger, Mott & Terry, counsel for def't." "Filed May 31, 1884. C. Dart, clerk."

EXHIBIT No. 6.

The executors of the estate of Jas. Morgan in ac. with the estate, Dr.

115

| | | | | | |
|---|---|---|---|---|---|
| 1877. | | | | | |
| April 27. | To cash | from A. Prunier | $185 | | |
| May 16. | " | on note of F. M. Wills | 81 | 38 | |
| Nov. 5. | " | " H. Prunier | 140 | 00 | |
| " 15. | " | " " | 120 | 00 | |
| | | | | | 526 38 |
| 1878. | | | | | |
| Jan'ry 3. | " | on rent on H. Glass place | 12 | 25 | |
| " 16. | " | " Dr. Garrett on Henderson place | 150 | 00 | |
| " 28. | " | " P. H. Weber | 30 | | |
| | | | | | 192 25 |
| 1879. | | | | | |
| Jan'ry 11. | " | Dr. Garrett on Henderson place | 259 | 00 | |
| April —. | " | for ⅓ league, Middleton survey, by order district court, at auction | 358 | 78 | |
| May 28. | | T. F. Garner | 136 | 61 | |
| | | | | | 754 39 |
| 1880. | | | | | |
| March 3. | " | E. J. Isaacks | | | 65 00 |
| 1882. | | | | | |
| April 20. | " | " | | | 25 00 |
| 1883. | | | | | |
| March 3. | " | Dav. Thomason, freedman | 95 | 00 | |
| May 3. | " | Wm. Benson, Uvalde for 640 a., Dav. Middleton survey | 777 | 60 | |
| Oc'r 1st. | " | Thos. Ballard, 44¾, No. 13, Locey Pearsoll, Walker Co. | 100 | | |
| | | | | | 972 60 |
| 1884. | | | | | |
| Febr'y 20. | " | Joseph Attaway, Nos. 2 & 15, 100 a., Pearsoll survey, Waller Co. | 250 | | |
| " 17. | " | Dav. Thomason, freedman | 130 | | |
| March 17. | " | E. J. Isaacks | 63 | | |
| | | E. R. Smith | 100 | | |
| | | | | | 543 |
| | | | | | 3,078 62 |

I have in my possession one note of Dav. Thomason, freedman, dated Febr'y 20, 1884, for 480.

Also 2 notes of E. R. Smith, Tyler Co., for $79.60 each, due in 1 and 2 years from March 1st, 1884, 159.20.

Also 1 note of T. F. Garner for land formerly sold to J. F. Peters Oc'r, 1869. Peters paid nothing, and subsequently I sold to
116 Garner, he paying 200 cash and note for $241.11, retaining vendor's lien, in Sept. 12, 1876. In April 16, 1879, he paid $136.61. Since then he died, leaving large family. His wife refuses to pay balance purchase-money and wished to give back the land. I have employed Crosson & Crosson, of Livingston, Polk Co., to bring suit and close out vendor's lien.

*In* Oct. 6th, 1876, I sold to Jeff. Mays, a freedman, 58⅔ acres land from Scates' league, in Polk county, giving bond for title when paid for. He has paid nothing; has left the land; given up his bond, which was never recorded, and refuses to pay.

There is also 1,850 acres in Chas. A. Felder league, Hardin Co., belonging to the estate, but claimed by the estate of Judge Moore; title not yet settled.

117 The estate of James Morgan, dec'd, to executors, Geo. Ball and H. F. Gillette, Dr.

| | | | | | |
|---|---|---|---|---|---|
| 1877. | | | | | |
| April | 28. | Notary fees for power of att'y | | 1 00 | |
| May | 10. | Paid tax Liberty Co. for 1876 | | 68 88 | |
| " | 28. | " Gillespie, surveying 640 a., Toby scrip | | 25 00 | |
| Dec'r | 4. | " Johns & Spence paying taxes for 1877 | | 10 00 | |
| May | 28. | " acknowledging deed to Presswood | | 50 | |
| June | 9. | " Co. clerk Hood Co. for copy of deed | | 1 35 | |
| Oc'r | 8. | " R. A. Lockhart, com's on land sale | | 42 50 | |
| Nov. | 5. | " S. S. Ashe, affidavit J. J. Blackman | | 50 | |
| | | | | | 149 73 |
| 1878. | | | | | |
| Jan'ry | 22. | " Johns & Spence, taxes in out counties for 1877 | | 67 76 | |
| June | 1st. | " taxes in Polk Co. for 1877 | | 67 17 | |
| July | 1st. | " " Tyler " " | | 45 62 | |
| " | 4. | " " Liberty Co. " | | 32 05 | |
| " | 15. | " Tyler Co. court ejecting M. L. Long | | 13 10 | |
| " | 30. | " Waller Co. court ejecting Geo. King | | 29 05 | |
| Sep'r | 14. | " taxes Harris Co. for 1877 | | 20 45 | |
| | | | | | 275 20 |
| 1879. | | | | | |
| Feb'ry | 7. | " acknowledging deed to Dr. Garrett | | 50 | |
| March | 21. | " tax J. J. Blackman league, Tyler Co. | | 12 45 | |
| July | 15. | " R. Lockhart, partitioning Morgan estate | | 365 00 | |
| " | " | " J. Burke, Jr., costs of court | | 59 50 | |
| " | " | " Alfred Isaacs, one of partitioners | | 15 | |
| | | | | | 452 45 |
| 1880. | | | | | |
| Feb'ry | 2. | " tax on Dav. Middleton, Harris Co. | | 4 00 | |
| March | 11. | " " J. J. Blackman league, Tyler Co. | | 13 18 | |
| April | 5. | " redemption tax on 100 a. sold P. Weber | | 11 01 | |
| May | 1st. | " " " 143¾ to E. L. Reese | | 7 88 | |
| | | | | | 36 07 |
| 1881. | | | | | |
| Feb'ry | 18. | " tax Waller Co. for 1880 | | 1 88 | |
| March | 15. | " costs of court on J. J. Blackman's league | | 117 40 | |
| May | 24. | " tax Tyler Co. for 1880 | | 12 44 | |
| Nov. | 1. | " acknowledging deed to E. J. Isaacks | | 50 | |
| | | | | | 132 22 |
| | | | | | 1,045 67 |
| 1882. | | | | | |
| Jan'y | 13. | Paid tax Waller Co. 1881 | | 1 70 | |
| Feb'ry | 14. | " tax & redemption of Dav. Middleton 640 a. survey, Uvalde Co., 33.80; exchange, .70 | | 34 50 | |
| | | " expenses to Livingston, collecting | | 16 20 | |
| 118 | | | | | |
| Febr'y | 14. | " tax for Tyler Co. for 1881 | | 10 00 | |
| May | 30. | " acknowledging deed, Uvalde county | | 1 50 | |
| | | | | | 63 90 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 1883. | | | | | | |
| Jan'ry | 12. | " | tax Uvalde Co., for 1882 | 6 25 | | |
| " | 20. | " | " Waller " " " | 1 04 | | |
| April | 10. | " | acknowledging deed | 2 50 | | |
| May | 25. | " | Hutcheson & Carrington for J. M. Lee, com'rs int. in Dav. Middleton, Uvalde Co. | 90 54 | | |
| " | 26. | " | Willie & Cleveland, fee in case of Heirs of Kirkham *vs.* Estate | 300 00 | | |
| " | 7. | " | tax Tyler Co. for 1882 | 16 50 | | |
| July | " | " | trip attending to partition Blackman league | 12 50 | | |
| August | 6. | " | acknowledging deed, Thos. Ballard | 50 | | |
| Aug. | 20. | " | " " by Ball | 1 35 | | |
| June | 4. | " | receipt of Mrs. F. B. Allan | 30 | | |
| Nov'r | 27. | " | S. P. West, fees in suit of Blackman league | 166 00 | | |
| Nov'r | " | " | acknowledging deed of partition | 1 00 | | |
| Dec'r | 31. | " | " " Joseph Attaway | 1 00 | | |
| | | | | | | 629 18 |
| 1884. | | | | | | |
| Febr'y | 14. | " | estate W. B. Cline for services on estate | 205 | | |
| " | 19. | " | J. M. Crosson | 20 | | |
| " | 20. | " | Baker & Botts | 500 | | |
| " | 21. | " | tax Waller Co. 1883 | 96 | | |
| " | " | " | " Tyler | 18 75 | | |
| April | 7. | " | acknowledging 2 deeds | 1 00 | | |
| | | | | | | 745 71 |
| | | | | | | 2,484 46 |
| | | | To 5 % on receipts, 3,078.62 | 153 93 | | |
| | | | " 5 % on disbursements, 2,484.46 | 124 22 | | |
| | | | " decree of court due me on partition | 790 58 | | |
| | | | | | | 1,068 73 |
| | | | | | | 3,553 19 |
| | | | Amount received | 3,078 62 | | |
| May 1st, 1884. | | | Due executors | 474 57 | | |
| | | | | $3,553 19 | | |

Endorsement on foregoing Exhibit No. 6: "The estate of James Morgan in ac. with said executors of estate." "Ch., 173." "Exhibit No. 6, annexed to answer of Henry F. Gillette," "being supplemental exhibit of account with estate of
119 James Morgan since decree of partition." "Ballenger, Mott & Terry, counsel for def't." "Filed May 31, '84. C. Dart, clerk."

## Exhibit No. 7.

*Amount of Land Sold from the Interest Partitioned to me in Morgan Estate, with Amount of Taxes and Expenses on Same Paid by H. F. Gillette.*

| | | | | | |
|---|---|---|---|---|---|
| 1881. | | | | | |
| Jan'ry | 1. | Sold J. R. Edmonston 320, Bexar Co., for $350, less 10 % commission | | | Cash. 315 00 |
| | | Taxes for 1878, 4.50; 1879, 4.32; 1880, 3.52; 1881, 3.52 | 15 86 | | |
| | | *Ben. Lanier Survey, Tyler Co.* | | | |
| 1880. | | | | | |
| Dec'r | 2. | Thos. Coleman, 107½ a. for 107.50, ½ cash, balance note 1 & 2 y'rs, less 1 % | | | 96 75 |
| | | Frank Brown, 136½ a. for 136.50, less com's; ⅓ cash, balance 1 & 2 y'rs | | | 122 85 |
| 1884. | | | | | |
| Febr'y. | | Dickens 69 a. for $138, less com's; $50 cash, balance, note 1 & 2 y'rs | | | 124 20 |
| | | Taxes, 1878, 7.34; 1879, 9.00; 1880, 8.50; 1881, 7.70; 1882, 12.98; 1873, 11.25 | 66 77 | | |

| 1882. | | | Cash. |
|---|---|---|---|
| | *Henry White Survey, San Jacinto Co.* | | |
| April 1st. | A. A. Smith, 112 a. for $336, less com's | | 302 40 |
| | Paid surveying to establish lines & corners | 35 00 | |
| | Taxes, 1878, 5.84; 1879, 4.75; 1880, 5.63; 1881, 3.83; 1882, 2.80; 1883, 3.00 | 25 85 | |
| | *Waller County, Locey Pearsall Survey.* | | |
| | Taxes, 1878, 2.94; 1879, 1.08, 1880, .55; 1881, .44; 1882, .34; 1883, .34 | 5 69 | |
| | Redemption tax for 1877 | 3 00 | |
| | *James Yeoman, Erath Co.* | | |
| | Taxes, 1878, 9.25; 1879, 9.00; 1880, 10.00; 1881, 8.75; 1882, 8.50; 1883, 9.00 | 54 50 | |
| | *Harris County Lands, 723 A.* | | |
| | Taxes, 1878, 8.31; 1879, 7.66; 1880, 7.50; 1881, 7.95; 1882, 4.70; 1883, 4.33 | 40 45 | |
| | *Crockett & Edwards Co., Jacob Winfrey Survey.* | | |
| | 2,302½ acres, J. Ramsey, 1,726.87½, less com's, 1 % ; ½ cash and ½ in 2 y'rs, at 8 % | | 1,554 19 |
| | Taxes for 5 years at $5 | 25 00 | |
| | Redemption from J. H. Raymond | 76 00 | |
| | | 101 | |
| 120 | | | |
| | Paid Willie & Cleveland for writing trustee deed | 25 | |
| | " Taylor for recording same | 3 | |
| | | 376 12 | 2,515 39 |

The foregoing Exhibit No. 7 endorsed as follows: "Ch, 173. Exhibit No. 7." "Annexed to answer of Henry F. Gillette." Ballinger, Mott & Terry, counsel for def't." "Filed May 31st, 1884. C. Dart, clerk."

## Exhibit No. 8.

$1,200.00. Galveston, Texas, *June* 13, 1872.

Six months after date we promise to pay to the order of the Texas Banking and Insurance Company the sum of one thousand and two hundred dollars for value received, with interest at the rate of twelve per cent. per annum from maturity till paid, payable at the office of said company in the city of Galveston, Texas, and secured by deed of trust of even date herewith, duly stamped.

HARRY L. ALLAN.
FANNIE B. ALLAN.

No. 32. Due Dec'r 13–16, 1872.

The foregoing Exhibit No. 8 endorsed as follows: "Ch., 173." "Exhibit No. 8." "Annexed to answer of Henry F. Gillette." Ballinger, Mott & Terry, counsel for def't." "Filed May 31, '84.
121 C. Dart, clerk."

*From Rules. Def't Ans. Filed.*

Circuit Court of the United States, Eastern District of Texas.

FANNY B. ALLAN
*v.*
HENRY F. GILLETTE. } Equity No. 173.

On this 31st day of May, 1884, came the defendant herein, Henry F. Gillette, by his counsel, Ballinger, Mott & Terry, and filed herein his answer to the complainant's bill of complaint, together with Exhibits No. 1, 2, 3, 4, 5, 6, 7, & 8 accompanying the same.

Attest: C. DART,
*Clerk U. S. Circ't Court, E. D. T., G.*

*Order Setting Cause for Hearing.*

Circuit Court of the United States, Eastern District of Texas, Holding Sessions at Galveston.

FANNIE B. ALLAN, Complainant,
*against*
HENRY F. GILLETTE, Defendant. } Equity No. 173.

And now, on this day, comes the complainant, by her coun-
122 sel, Brady & Ring, and sets this cause down for hearing on bill and amendment and exhibits and answer and exhibits on the first day of the next term of this court or so soon thereafter as the same can be heard by the court.

July 28, 1884.

BRADY & RING,
*Solicitors for Complainant.*

The clerk of the U. S. circuit court at Galveston will please file the above order and enter the same in the order book as of August rules, 1884.

BRADY & RING,
*Solicitors for Complainant.*

Endorsements: "Ch., 173. Fannie B. Allan *vs.* Henry F. Gillette. Order by complainant setting cause for hearing on bill & answer & exhibits. Filed July 28, 1884. C. Dart, clerk.

*From Rules. Order Setting Down Cause for Hearing.*

Circuit Court of the United States, Eastern District of Texas, Holding Sessions at Galveston.

FANNIE B. ALLAN, Complainant,
*against*
HENRY F. GILLETTE, Defendant. } Equity No. 173.

And now, on this day, comes the complainant, by her coun-
123 sel, Brady & Ring, and sets this cause down for hearing on bill and amendment and exhibits and answer and exhibits on

the first day of the next term of this court or so soon thereafter as the same can be heard by the court.

July 28, 1884.

(Signed) BRADY & RING,
*Solicitors for Complainant.*

Entered July 28, 1884, as of August rules, Aug. 4th, 1884, by direction of complainant's solicitors, Brady & Ring.

Attest: C. DART,
*Clerk U. S. Circuit Court, E. D. T., G.*

*Cause Heard & Submitted.*

From Minutes March Term, March 10, 1885.

FANNIE B. ALLAN
*v.*
HENRY F. GILLETTE. } Ch., 173.

On this day came the parties to this suit, by their counsel, and the cause having heretofore been set down for hearing by the complainant on the bill and amendment and exhibits and answer and exhibits, thereupon a hearing of the cause was had before the court and submitted.

*Opinion. Filed May* 1, 1885.

United States Circuit Court, Fifth Judicial Circuit, at Chambers.

NEW ORLEANS, *April 25th*, 1885.

DON A. PARDEE, *Judge:*

124 Hon. C. B. Sabin, U. S. judge, Galveston, Texas.

DEAR JUDGE: Yours of 21st inst. is at hand this morning on my return from Waco.

In the case of Allen *vs.* Gillette I am confirmed in my first impression that a decree should be given the defendant dismissing the bill with costs. The complainant has no natural equity, as there is no fraud shown, and defendant seems to have acted with the best of faith. Under the pleadings (as the answer is not denied, but is taken as true) I think it fair to infer that the purchase was made with complainant's acquiescence if not direct consent; and I think complainant's long delay in bringing suit is inexcusable, notwithstanding her coverture. I will concur in a decree for defendant, but if you think otherwise or desire to hear further argument, let the case go over to be reheard and reargued.

I congratulate you on dispatch of business.

Yours very truly. DON A. PARDEE.

Endorsements: Filed May 1, 1885. C. Dart, clerk.

In U. S. Circuit Court at Galveston, Texas.

ALLAN
*v.*
GILLETTE. } Ch., 173.

125 In addition to the foregoing, in which I concur, I would remark that there is a difference between a sale by an heir or devisee pending administration and a sale by a representative of an estate of property embraced in it, and that such property fairly purchased by an executor at a public sale made by the agent & trustee of the devisee & his creditor, under an irrevocable power of sale coupled with an interest, becomes as fully the property of such purchaser as if so made by the devisee in person & can only be called in question by the estate in the regular course of its administration; and, further, that where a case is submitted showing such cause as would justify the court in which the estate was being administered in granting an executor permission to purchase at a sale made by an estate of which he is the representative, it would clearly render necessary the recognition of the validity of a sale made by an heir or devisee through his agent acting under an irrevocable power, & at all events justify the dismissal of a bill by such devisee seeking the establishment of resulting trusts & claiming an equity of redemption without tendering in fact the purchase-money with interest & reasonable compensation for care of property sought to be redeemed. All the equities of the bill having been fully denied

126 I fully concur with Judge Pardee in the opinion that the complainant's bill ought to be dismissed at her costs, and it is so ordered.

May 1, 1885.

CHAUNCEY B. SABIN,
*U. S. Dist. Judge for the Eastern Dist. of Texas.*

Endorsements: "Ch., 173. In U. S. circuit court at Galveston, Texas. Fannie B. Allan *vs.* H. F. Gillett. Opinions. Filed May 1, 1885. C. Dart, clerk."

*Final Decree. Filed May* 1, 1885.

Circuit Court of the United States, Eastern District of Texas.

FANNIE B. ALLAN, Complainant,
*vs.*
HENRY F. GILLETTE, Defendant. } Equity No. 173.

MAY 1ST, 1885.

This cause came on to be heard at this term upon the bill, amended bill, and exhibits and answer and exhibits, and was argued by counsel; and thereupon, upon consideration, it was considered, ordered, adjudged, and decreed as follows, viz., the court finds from the pleadings (the answer not being denied, but taken as true) and from the evidence that the complainant is not entitled to the equitable relief prayed for in her bill; that no fraud has been shown, and that

the defendant has acted with the best of faith; that the pur-
127 chase complained of was made with complainant's acqui-
escence, if not direct consent, and that the complainant's long delay in bringing her suit is inexcusable, notwith- her coverture, and that complainant's bill ought to be dismissed with costs.

Wherefore it is further considered, adjudged, and decreed by the court that complainant's bill be dismissed, and that defendant recover of the complainant all costs about this suit incurred and have execution therefor.

It is further considered by the court that execution may issue against each party for any unpaid costs incurred by them, respectively, for the use and benefit of the officers of this court, respectively, entitled to the same.

And thereupon the complainant in said cause, by her solicitors, gave notice in open court and asked an appeal to the Supreme Court of the United States from the decree in this cause, which appeal is allowed, and the appeal bond of the complainant to perfect her appeal is hereby fixed at the sum of five hundred dollars.

CHAUNCEY B. SABIN,
*U. S. District Judge for the Eastern District of Texas.*

Endorsements: "Ch., 173. Fannie B. Allan *v* Henry F. Gillette. Final decree. Filed May 1, 1885. C. Dart, clerk."

128 *Final Decree.*

From Minutes, March Term, May 1, 1885.

Circuit Court of the United States, Eastern District of Texas.

FANNIE B. ALLAN, Complainant,
*vs.*
HENRY F. GILLETTE, Defendant. } Equity No. 173.

MAY 1ST, 1885.

This cause came on to be heard at this term upon the bill, amended bill, and exhibits, and answer and exhibits, and was argued by counsel; and thereupon, upon consideration, it was considered, ordered, adjudged, and decreed, as follows, viz: The court finds from the pleadings (the answer not being denied, but taken as true) and from the evidence that the complainant is not entitled to the equitable relief prayed for in her bill; that no fraud has been shown, and that the defendant has acted with the best of faith; that the purchase complained of was made with complainant's acquiescence, if not direct consent, and that the complainant's long delay in bringing her suit is inexcusable, notwithstanding her coverture, and that complainant's bill ought to be dismissed with costs.

Wherefore it is further considered, adjudged, and decreed by the court that complainant's bill be dismissed, and that defendant
129 recover of the complainant all costs about this suit incurred and have execution therefor.

It is further considered by the court that execution may issue against each party for any unpaid costs incurred by them, respect-

ively, for the use and benefit of the officers of this court, respectively, entitled to the same.

And thereupon the complainant in said cause, by her solicitors, gave notice in open court and asked an appeal to the Supreme Court of the United States from the decree in this cause, which appeal is allowed, and the appeal bond of the complainant to perfect her appeal is hereby fixed at the sum of five hundred dollars.

CHAUNCEY B. SABIN,
*U. S. District Judge for the Eastern District of Texas.*

*Appeal Bond. Filed May* 5, '85.

Know all men by the- presents that we, Fannie B. Allan, as principal, and J. T. Brady and W. E. Kendall, as sureties, are held and firmly bound unto Henry F. Gillette in the full and just sum of five hundred dollars ($500.00), to be paid to the said Henry F. Gillette, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of May, in
130 the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a regular term of the circuit court of the United States in and for the eastern district of Texas, at Galveston, in a suit depending in said court between Fannie B. Allan, as complainant, and said Henry F. Gillette, as defendant, to wit, on the first day of May, 1885, a final decree was rendered against the said Fannie B. Allan dismissing her bill of complaint in said cause and adjudging that she pay all costs of suit, and the said Fannie B. Allan having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Henry F. Gillette, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Fannie B. Allan shall prosecute her appeal to effect and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

FANNIE B. ALLAN, [L. S.]
By BRADY & RING.

Sealed & delivered in presence of—

J. T. BRADY. [L. S.]
131 W. E. KENDALL. [L. S.]

Approved by—

C. B. SABIN,
*U. S. Dist. Judge for the Eastern District of Texas.*

Endorsements: "No. 173. Equity. Fannie B. Allan *v.* Henry F. Gillette. Appeal bond to Supreme Court. Filed May 5th, 1885. C. Dart, clerk."

*Bond Approved & Appeal Allowed.*

From Minutes, March Term, May 5, 1885.

FANNIE B. ALLAN
*v.*
HENRY F. GILLETTE. } Ch., 173.

The complainant in this cause having executed the bond required by the order of this court to perfect her appeal to the Supreme Court of the United States in this cause, with sureties, which bond has been approved by the judge of this court and filed in this cause; wherefore it is ordered that the appeal prayed for by the complainant be allowed, and thereupon the said judge signed the citation to the defendant, returnable at Washington on the second Monday of October next.

*Citation on Appeal to Supreme Court. Filed May* 18, 1885.

THE UNITED STATES OF AMERICA:

132 The President of the United States to Henry F. Gillette, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, wherein Fannie B. Allan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] CHAUNCEY B. SABIN,
*U. S. Dist. Judge for the Eastern Dist. of Texas.*

Endorsements: Service accepted. "The defendant and appellee, H. F. Gillette, by his counsel, acknowledges and accepts service of the within citation and full notice of the appeal. Galveston, May 18, 1885. Ballinger, Mott & Terry, counsel for H. F. Gillette,
133 appellee. No. 173. Equity. Fannie B. Allan *v.* Henry F. Gillette. Citation on appeal to Supreme Court. Filed May 18th, 1885. C. Dart, clerk."

*Assignment of Errors. Filed May* 26, 1885.

Supreme Court of the United States, October Term, A. D. 1885.

FANNY B. ALLAN, Appellant, *v.* H. F. GILLETTE, Appellee.

Appeal from the circuit court of the fifth judicial circuit of the United States in and for the eastern district of Texas, sitting at Galveston.

On the first Monday in October of said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Fanny B. Allan, by her attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, in the action of the court in dismissing complainant's bill, because the facts stated in defendant's answer and admissions made therein by defendant showed the complain-
134 ant to be entitled to the relief prayed for in her bill, and that by the record aforesaid it appears that the decree given was given for the said Gillette and against the said Allan, whereas by the law of the land said decree ought to have been given for the said Allen and against the said Gillette, and the relief prayed for by the former granted.

Wherefore the said Fanny B. Allan prays that the decree rendered as aforesaid be reversed, annulled, and altogether held for naught, and that said Supreme Court grant the relief prayed for in said bill and render a decree in accordance with the prayer therein contained and such other decree as to said Supreme Court shall seem just.

J. T. BRADY,
*Attorney for Appellant.*

Endorsements: "Equity No. 173. Fanny B. Allan *v.* H. F. Gillette. Assignment of errors. Filed May 26th, 1885. C. Dart, clerk."

*Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *Eastern District of Texas:*

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, do hereby certify the foregoing to be a true copy of the record and of the assignment
135 of errors and of all proceedings in the cause lately pending in said court, numbered 173 on the equity docket, entitled "Fannie B. Allan *vs.* Henry F. Gillette," as the same now appears of record in my office.

To certify which witness my hand and seal of said circuit court, at Galveston, this 26th day of May, 1885.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
*Clerk U. S. Circ't Court, Eastern District of Texas,*
*At Galveston.*

136 THE UNITED STATES OF AMERICA:

The President of the United States to Henry F. Gillette, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, wherein Fannie B. Allan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal United States Circuit Court, Eastern District of Texas.]

CHAUNCEY B. SABIN,
*U. S. Dist. Judge for the Eastern Dist. of Texas.*

137 The defendant and appellee, H. F. Gillette, by his counsel, acknowledges and accepts service of the within citation and full notice of the appeal.

Galveston, May 18, 1885.

BALLINGER, MOTT & TERRY,
*Counsel for H. F. Gillette, Appellee.*

On this — day of ——, in the year of our Lord one thousand eight hundred and ——, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the —— A. D. 187–.

Endorsed: No. 173. Equity. Fannie B. Allan *vs.* Henry F. Gillette. Citation on appeal to Supreme Court. Filed May 18th, 1885. C. Dart, clerk.

Endorsed on cover: E. Texas C. C. U. S. No. 277. Fannie B. Allen, appellant, *vs.* Henry F. Gillette. Filed September 1, 1885.

FILED.
APR 10 1886
JAMES H. McKENNEY,
CLERK.

IN THE

# SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

No. 999

**FANNIE B. ALLEN, Appellant,**

*vs.*

**H. F. GILLETTE, Appellee.**

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT GALVESTON.

## BRIEF OF APPELLANT.

136 THE UNITED STATES OF AMERICA:

The President of the United States to Henry F. Gillette, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, wherein Fannie B. Allan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal United States Circuit Court, Eastern District of Texas.]

CHAUNCEY B. SABIN,
*U. S. Dist. Judge for the Eastern Dist. of Texas.*

137 The defendant and appellee, H. F. Gillette, by his counsel, acknowledges and accepts service of the within citation and full notice of the appeal.

Galveston, May 18, 1885.

BALLINGER, MOTT & TERRY,
*Counsel for H. F. Gillette, Appellee.*

On this — day of ——, in the year of our Lord one thousand eight hundred and ——, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the —— A. D. 187–.

Endorsed: No. 173. Equity. Fannie B. Allan *vs.* Henry F. Gillette. Citation on appeal to Supreme Court. Filed May 18th, 1885. C. Dart, clerk.

Endorsed on cover: E. Texas C. C. U. S. No. 277. Fannie B. Allen, appellant, *vs.* Henry F. Gillette. Filed September 1, 1885.

27-581

Office Supreme Court U. S.
FILED.
APR 10 1886
JAMES H. McKENNEY,
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

No. 889

**FANNIE B. ALLEN, Appellant,**

*vs.*

**H. F. GILLETTE, Appellee.**

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT GALVESTON.

## BRIEF OF APPELLANT.

IN THE

# SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

*No.*.....

---

**FANNIE B. ALLEN, Appellant,**

*vs.*

**H. F. GILLETTE, Appellee.**

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT GALVESTON.

---

## BRIEF OF APPELLANT.

---

### STATEMENT.

This is a suit in equity, the same having been tried on bill and answer.

Briefly stated, the facts show that one James Morgan departed this life in 1866, leaving a large estate, consisting of about seventy thousand acres of land, all of which was unproductive except a homestead on Galveston Bay, containing several hundred acres, together with improvements on the same, household goods, farm stock, and some other personal property.

The said James Morgan, deceased, devised his property, after payment of his debts, to his six grand-children, who were then minors, residing with deceased at the time of his death. By the terms of the will the defendant, Gillette, and one Geo. Ball, were appointed executors, and authorized to administer the estate, after probating the will and filing inventory, without executing bond, and

without accountability to, or supervision of a probate court. Both executors accepted the trust. The defendant, Gillette, became the actual trustee who took full charge of the estate and the management thereof. Ball did nothing more than formally consent to the acts of Gillette, and died before the commencement of this suit.

About the year 1872, six years after the death of her said deceased grand-father, the complainant, Fannie B. Allen, one of said devisees, having received but little, if anything, of her portion of said estate, executed a deed of trust on her undivided one-sixth interest in the lands belonging to the same, to secure the payment of a note of $1200, which deed of trust was foreclosed twelve months' later, at which foreclosure sale Gillette became the purchaser.

At this time the estate was yet unsettled; the lands had not been partitioned, and defendant, Gillette, was still the executor. Complainant was then a married woman, and so continued to be until a short time before the institution of this suit.

The bill was brought to establish the fact that Gillette held the land acquired by him at this foreclosure sale on a resulting trust, and complainant prayed in effect that she be permitted to redeem on payment to defendant of the amount of money to which he was entitled, and that in the event of her being unable to redeem, within such reasonable time as the court might direct, then that the land be re-sold for her benefit, as though under mortgage to defendant for the amount of his advances and interest.

The court below rendered judgment against complainant, dismissing her bill with costs.

The

ERROR ASSIGNED

is to the effect that the court below erred, "because the facts stated in defendant's answer, and admissions made therein by defendant, show the complainant to be entitled to the relief prayed for in her bill." Rec. 65.

FURTHER STATEMENT.

In order to save the court the trouble of referring to the record, we herewith submit a detailed statement of all the material allegations in complainant's bill, which were admitted in defendant's answer.

Complainant is a grand-daughter of James Morgan, deceased, who died in 1866, the owner of about 70,000 acres of land, situated in different portions of the state (and other property). By the terms of Morgan's will complainant, as one of the devisees, and as heir of her mother, another devisee, became entitled to an undivided one-sixth interest in his estate. The defendant and the late Geo. Ball, of Galveston, qualified under the will as independent executors. By its terms they were exempted from necessity of giving bond, and were authorized to sell the lands pertaining to the estate, and settle it up without reporting to the Probate Court, or being accountable to any court or judge.

On the 13th day of June, 1872, the estate being still unsettled, and none of it having been partitioned among the heirs, complainant, joined by her late husband, Harry S. Allen, gave a deed of trust on all her interest in the estate, to secure a loan of $1200.00, for which they executed their joint note in favor of the Texas Banking and Insurance Company of Galveston, the same being due six months from date, and bearing interest at the rate of twelve per cent. per annum. Complainant and her husband were unable to pay off this note when it became due, and her interest in the estate was sold under the deed of trust. At this sale the defendant, H. F. Gillette, the executor, became the purchaser, paying for complainant's interest the amount due on the note, and taking the title in his own name.

Defendant alleges in his answer that he was entirely ignorant of the borrowing of said money, and of the execution of said deed of trust, until a very short time prior to the sale; that on ascertaining that complainant and her husband were wholly unable to raise the amount due on said note, or to prevent the sale of said interest, he went to the bank "to learn the exact situation, hoping to be able to aid in something favorable to complainant, but was informed that the sale would certainly take place unless the money was paid," that defendant then endeavored to persuade "his co-executor, the said Ball, to purchase the interest, though without effect, but that Ball suggested to defendant that he would loan him the money with which to purchase said interest, if he desired so to do; and that, in fact, the money with which defendant purchased said interest was loaned him" by his co-executor, the said Ball,

and another party; but that defendant never thought of making the purchase himself, until the matter was suggested to him by Ball.

Defendant further alleges that the sum paid by him for the interest was all that it was worth at that time, and as much as it could possibly have been made to bring; that complainant's husband was present at the sale, "and knew that the same was a purchase by defendant, in his own personal right, and for his own benefit, and without any trust for complainant, and made no dissent thereto in any manner, but expressed satisfaction that defendant became the purchaser."

Afterwards, in 1875, one C. C. Lewis, purchaser of the interest of one of the other devisees, brought suit for partition and account against said executors, and all the devisees under the will, except complainant herein; the defendant, Gillette, having been alleged in said suit to be the purchaser of Mrs. Allen's share in the estate (which shows that Mrs. Allen was no party to that suit). A decree of partition was rendered in this suit in 1877, by which there were set aside to defendant the lands specified in the bill, and described in defendant's answer. The estate is still unsettled, a considerable amount of land remaining in the hands of the executors.

Defendant alleges that the indebtedness of the estate of Morgan was large, amounting, as shown by exhibit attached to his answer, to over $20,000; that most of the lands were unimproved, and could only be sold occasionally without great sacrifice; that if the settlement of the estate had been forced, it would not have yielded sufficient to pay the indebtedness; and, in detail, defendant's answer shows how he had acted in good faith, and with all reasonable diligence, in the discharge of the trust.

Complainant's said husband died about six months before the institution of the suit.

In the original bill, complainant sets out at length quite a detailed account of the transaction, alleging many additional circumstances connected with the same, which were calculated to show important derelictions of duty on the part of defendant; all of which, however, defendant expressly denies. Complainant—and the fact is particularly called to the attention of the court—did not, however, in her original bill, and has not since, alleged that defendant was guilty of fraud of any kind, either express, implied or

constructive; nor is it claimed that the facts alleged in the bill show fraud of any kind on the part of defendant.

Complainant prayed that she be permitted to redeem the interest in the estate set aside to defendant, on payment of the money advanced by him in purchasing the same, with eight per cent. interest, less such sums as defendant may have realized from sales of portions of the same; and in the event of her inability thus to redeem it within a certain time, to be fixed by the court, then, that it be sold by a special master, to be appointed by the court, or so much of the same as might be necessary to reimburse Gillette, and that the residue be conveyed to her.

Defendant demurred at length to the bill, claiming first, that it did not show any fraud perpetrated by defendant in connection with the sale, and that hence defendant, notwithstanding the fiduciary relationship, could bid the property in for his own benefit; and, second, that if complainant ever had any right to attack the sale, he had long since lost such right by her laches, and that equity and good conscience would not permit her at this late day, and after material changes in the value of the land, to attack the same.

## PART I.

### FIRST POINT.

#### Statement of Complainant's Theory.

#### As to the Title Acquired by Defendant.

Our bill is framed upon the theory that the defendant, Gillette, at the time of the foreclosure sale, was holding, as executor of the estate, complainant's interest in trust for her benefit; that he could not purchase the same at that sale otherwise than upon a resulting trust for her benefit; that the law conclusively presumes that if a trustee purchase under such circumstances, he takes the title for the benefit of the *cestui que trust*, and simply for the purpose of protecting the latter's interest; that Gillette, by his purchase, acquired the right of holding the property as a mortgage, and was entitled to realize what he had paid for it, in the same manner as a mortgagee is entitled

to realize from his investment; that, as in the case of a mortgagee, Gillette, at any time after his purchase, could have filed a bill in equity, setting up the circumstances connected with the same, and asking that the property be resold under direction of the court; that it would have been within the discretion of the court, in decreeing such sale, to have granted Gillette permission to bid the property in for his own benefit, if necessary, in order to make it bring the amount of his advances, with interest; that in no other way, except by limitations, or by the express ratification of Mrs. Allen, the complainant, founded on a valuable consideration, could Gillette have acquired a beneficiary title to the property.

REMARKS.

In our opinion, the decision of this case turns upon the simple proposition as to whether the property acquired by Gillette was taken on a resulting trust or on a constructive trust.

1ST.—CHARACTER OF THE TRUST.

At the time of the foreclosure sale, the relationship between Mrs. Allen and Gillette, was in the highest degree that of trust and confidence—that of a trustee and a *cestui que trust*. This was so in a stronger light than is usually the case between executors and legatees, since by the terms of the will, the executors were authorized to sell the lands and settle up the estate, without being accountable, in the language of the will, "to any judge or court."

The value of Mrs. Allen's interest in the estate depended, in a large degree, upon Gillette's integrity, and upon his willingness to faithfully execute the great trust imposed upon him. It is, of course, unnecessary for us to remark that Gillette was bound to administer the trust, with no other purpose in view than that of subserving the interests of Mrs. Allen and her co-beneficiaries.

2D.—POLICY OF THE LAW IN REGARD TO SUCH TRUSTS.

The law recognizes the weakness of human nature, by removing, so far as practicable, in cases of trust like the

one at bar, the temptation to perpetrate a fraud upon the beneficiary. This is done by extinguishing the hope of being benefitted by the results of the fraud, and hence, public policy absolutely prohibits a trustee from acquiring, by any indirect means, an interest in the estate of the beneficiary, whether he act in good faith or not.

As stated in Pomeroy's Equity, volume 2, page 482, in regard to transactions like the one under discussions, "it is entirely immaterial to the existence and operation of this rule, that the sale is a fair one, that no undue advantage is obtained, or that a full consideration is paid, or even that the price is the highest that could be obtained; the policy of equity is to remove every temptation from the trustee."

And in exparte Daey, 6 Vesey, 627, the extract being also found on page 485, volume 2, Pom. Eq., Lord Eldon gave the practical reason for this stringent rule in these words: "It is founded in this, that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court, (by which I mean in the power of the parties,) in ninety-nine cases out of an hundred, whether he has made advantage or not."

3D.—POLICY OF THE LAW ILLUSTRATED BY THE FACTS OF THIS CASE.

Suppose Gillette had intended, from the time he accepted the trust, to use it as far as possible for his own benefit, to take advantage of any opportunity which might arise of enriching himself out of the subject matter of the trust; if the law permitted him to acquire the interest of one of the legatees at a forced sale, the hope of getting it at such a sale would tempt him to create the opportunity, at least it would tempt him to relax his efforts to bring about a speedy settlement of the estate, and as Lord Eldon says, "in ninety-nine cases out of an hundred," so in this case, it would be impossible to prove that he had thus relaxed his efforts. The legatees were young and inexperienced; after years of weary waiting, their necessities, or impatience, would tempt them to the course taken by Mrs. Allen. To illustrate further, suppose Gillette, a year or two previous to the sale under the mortgage, had incidentally heard of a man wishing to invest in large tracts of Texas lands, and to whom he could probably have sold,

a a fair price, a sufficient quantity of land to have settled the debts of the estate, and have thus made the remainder of the lands at once available to the legatees; and suppose at the same time, from what he knew of Mrs. Allen, he was confident that she would mortgage her interest within a short time, as she in fact did, would he have sought out that man and endeavored to have made such a sale? Yet how could the legatee ever prove that he had had such an opportunity? Again, after her interest was advertised for sale, in how many subtle ways may he have depreciated its value, ways which as Lord Eldon says: "It is utterly impossible to examine on satisfactory evidence in the power of the court." He may avoid meeting those desirous of enquiring into the value of her interests; by innumerable devices he might have accomplished his purpose of preventing any opposition to his bid, and yet, not leave a scintilla of evidence by which this fact could be proven. He was the repository of all that was known in regard to the estate, and all information in regard to the value of her interest in it must have been derived through him. Was it not his duty to give full and correct information in regard to it to all desirous of becoming bidders? If the law permitted him to have a personal interest in bidding in that property, would he not be tempted to misrepresent its value? On this point the following language from Adams' Equity, page 158, is applicable: "The permitting such a contract to stand, however honest it may be in a particular case, would destroy all security for the conduct of the trustee, for if he were permitted to buy or sell, in an honest case, he might do so in one having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise. It is not therefore, necessary to show that the trustee has in fact made an improper advantage, but the *cestui que trust*, if he has not affirmed the transaction, with full knowledge of the facts, may, at his option, set it aside."

And in Michaud vs. Girod, 4 How., 194, the Supreme Court of the United States says: "The purchase is void, and will be set aside at the instance of the *cestui que trust*, and a *resale ordered*, on the ground of the temptation to abuse, and the danger of imposition, inaccessible to the eye of the court."

4TH.—GILLETTE'S POSITION IS SIMPLY THAT OF A MORTGAGEE.

Story says, on page 311, Vol. 1, Story's Equity Jurisprudence, "in all cases where a purchase has been made by a trustee, on his own account, although sold at public auction, the rule does and will permit the *cestui que trust* to come in, at his option, and without showing essential injury, insist upon the experiment of another sale."

Gillette was entitled to be repaid the money, with interest, which he had in effect advanced for his *cestui que trust.* He might have applied to her for permission to sell a sufficient quantity of the land to reimburse himself, or as before stated he could have gone into court and asked that the property be resold under its directions.

The overwhelming weight of authority bears out the following language, used in Adam's Equity, page 159: "and it seems, the trustee may not purchase the trust property for his own benefit when it is sold under a judicial decree which he was not instrumental in procuring, unless under the order of sale he was specially allowed to purchase."

And so in Perry on Trusts, Vol. 1, page 142: "if a person standing in a fiduciary relationship * * * * purchase an interest in the trust property with his own funds, as a reversion, a junior or a senior mortgage * * * he cannot retain the same, but must hold it upon a resulting trust for his beneficiary."

5TH.—TWO CLASSES OF TRUSTS, AND RULE RELATIVE TO THE SAME.

In this connection, it is well to bear in mind the distinction between the two kinds of trusts arising out of dealings between a trustee and his *cestui que trust.*

*First.*—The first class of cases are those in which the trustee acquire an interest in the trust property without the knowledge or without the consent of the beneficiary, cases in which the parties do not meet directly, and mutually agree and consent to the bargain and sale.

It is evident that the case at bar falls within this class, and as stated before, the trustee can only acquire the title in trust for the beneficiary; the trustee only holds the property as a mortgage to secure the sum advanced by him in purchasing it.

*Second.*—The second class of cases are those in which the *cestui que trust* expressly consents to the purchase by the trustee, as when they meet and deal together directly. It is evident that the case at bar does not fall within this class.

In the second class of cases, the sale is not always voidable, as a matter of course, though the burden of proof is always on the trustee to show that the sale was a fair one, and that he fully explained to the beneficiary every fact within his knowledge affecting the value of the latter's interest.

The distinction between these two classes of trusts is set forth clearly and fully in volume 2, of Pomeroy's Equity, page 481, *et seq.*, together with the rule as stated above, relative to the same. We would call the attention of the court especially to this reference.

*Reasons for the above Rule, and application of the same to the facts alleged in the Bill.*

The reason why a sale should be voidable, as a matter of course, when the title is acquired by indirect means, as in the first class of cases, and not thus voidable in the second class of cases, where the title is acquired directly, by means of a direct bargain with the beneficiary, is obvious.

In the latter class a full and complete explanation from the trustee is necessary, in order to make the sale binding. There can be no sale without such explanation; the parties meet face to face, and deal directly; the opportunity for detecting fraudulent misrepresentations are ample; the *cestui que trust* can verify them by subsequent investigations; he naturally endeavors to ascertain full information in regard to the condition and value of the trust estate, and he is, to some extent, put upon his guard in dealing with the trustee directly. The opportunities for secret fraud and hidden maneuvering, are not so great in the former class of cases.

But when the title is acquired by the trustee by indirect methods, as in the case at bar, no explanation in regard to the character and value of the trust estate, is given to the *cestui que trust;* and he is easily subjected to any imposition which the trustee may seek to put upon him by

underhanded and unfair methods. Thus, in the case at bar, Gillette acquired the legal title without ever having made an explanation to Mrs. Allen in regard to the condition and value of the estate, or without her ever having been independently advised, by a competent, disinterested person, as would have been necessary had he purchased from her directly.

Other reasons in support of the rule, and further applications of it, will be given in Part II. of this argument. Page *post.*

6TH.—DECISIONS BEARING ON THE CASE AT BAR.

It is believed that it will be found in every case where a public sale to an executor or guardian has been held to be other than upon a resulting trust, that the sale was made within the eye of the court, and depended upon the ratification of the court for its validity. Thus a guardian, or an executor, ordinarily is required to report the sale to the court for the approval, and the title does not pass until such approval has been given. Such decisions are obviously inapplicable to the case at bar.

We will now consider in detail the decisions of our own Supreme Court, and those of the Supreme Court of the United States, which bear most directly upon the proposition under discussion; and in this connection we will also refer, to a considerable extent, to the leading decisions of other courts on the subject.

In Erskine vs. Le Baum, 3 Tex., 417, Le Baum in 1848 sold to Erskine his interest in the estate of which Erskine was administrator, Some years after, the heirs of Le Baum brought suit against Erskine to recover the land conveyed to him by their ancestor, by said purchase, claiming that on account of the fiduciary relationship, the sale was necessarily voidable. The court held that the sale was not voidable, and that the facts did not show any fraud, or that any unfair advantage was taken of the *cestui que trust.* The court refused to set the sale aside. It is true that Justice Lipscomb, in delivering the opinion of the court, uses language which is somewhat misleading, in regard to the true doctrine on which the law of that case was founded. Yet a careful consideration of the case, and of the authorities to which the learned Justice refers, will satisfy one of the soundness of the rule stated by us above

and that it is in no way modified by the decision. Erskine did not get the title by any indirect proceeding, but by a direct purchase from the heir; hence, the trust was a constructive one, and not a resulting trust, the distinction between a constructive trust and a resulting one, is decisive of this case, and is discussed by us at some length page *post*, of this argument.

The next case is that of Howard vs. Davis, 6 Tex., 174. Here the court simply held that a mortgagee, with power to sell, may purchase at his own sale. This is also held in Marsh vs. Hubbard, 50 Tex., 203, and the doctrine seems to be well sustained by authority and reason. In this case, the court, after carefully announcing the doctrine that a trustee cannot purchase the trust estate at a public sale, shows that a mortgagee is but a trustee in such cases, in a qualified sense, since he himself has an interest in the trust property, and that were he deprived of the privilege of buying it in, he might suffer great loss. We might also add, that in such cases, the right of the mortgagee to purchase the property arises from an implied contract with the *cestui que trust.*

The next case in point is that of Connolly vs. Hammond, 51 Tex., 607. Here, Steele executed an irrevocable power of attorney to Livermore, in 1839, and the same year Livermore conveyed the property to Bailey, whom it was claimed took it for the benefit of the agent, Livermore, and that it was, in effect, a sale by the agent to himself. The court held that if such was the fact, the sale was voidable only, and that the *cestui que trust* should assert his rights within a reasonable time, and that, in this instance, thirty years having elapsed since the sale was made, the *cestui que trust* was barred by his laches. But, in the same case, appealed again, and reported in 58 Tex., the court evidently declining to sanction the broad dictum of their predecessors, to the effect that the deed to Bailey was valid, unless attacked within a reasonable time, held, that after such a length of time, it would be presumed that Steele had received the benefits of the sale and had confirmed the same. See Sec. 965, Vol. 2, Pom. Eq. on Acquiescence, in this connection. Also page *post* of this argument.

The case of Michaud vs. Girod, 4 How., 560, is the leading case on this subject, which has been announced by the Supreme Court of the United States. It affirms in

every particular the principles asserted in this brief, and illuminates the subject by a wealth of reason, philosophy, and authority rarely met with even in the opinions of that august tribunal. The case is as nearly in point as almost any that we have been able to discover, and upon it alone we are willing to rest our rights.

In Stevens vs. Beall, 22 Wall., 339, a trustee sold the trust property at a public sale, to a third party. Thirteen years after the sale, and after the trustee had been discharged of his trust, he bought the same property from this third party. The court, after announcing the general rule stated in Michaud vs. Girod and other similar cases, say, that the mere circumstance stated above did not in itself render the sale voidable.

See also Wormly vs. Wormly, 8 How., 441, where the trustee sold for the purpose of paying his own debts.

Out of numerous cases sustaining our position in this argument, and which are referred to below, we have selected that of Quackenbush vs. Leonard, *et al.*, 9 Paige, 334, as being most nearly in point, and to it we would invite the attention of the court. The facts were these:

Leonard, Quackenbush and Webster, entered into an agreement to purchase land; Leonard was to advance the money, take the patents in his own name, and after he had sold enough of the land to reimburse himself for the outlay, he was to convey one-third of the land remaining to each of his associates, Quackenbush and Webster. The land scrip seems to have been acquired in accordance with this agreement in 1814, Leonard dying meanwhile, the patents were taken in the name of his executors. In 1828, Quackenbush conveyed his equitable interest in the lands to one Williams, to secure a debt of $1,480.00, as stated in a written defeasance, which authorized Williams to sell the land for the purpose of paying the debt. Williams waited four years to be paid his debt, and then told Quackenbush that unless he paid him he should be compelled to convey the mortgage to the executors of Leonard, they having offered him a thousand dollars for it. Quackenbush finally told Williams, if he must convey it to them, he must. The executors of Leonard thereupon paid Williams a thousand dollars for the mortgage. It was held by the court, that if the executors had been strangers to Quackenbush, they could have acquired all the interest which Williams held as mortgagee, and would be entitled

to the whole amount due Williams on the debt, with interest. The court then uses the following language: "But here the appellants are met by the rule in equity, that a trustee buying a debt or incumbrance against the estate held by him in trust, can only be allowed the amount actually paid therefor, with interest," referring to Lewin's Law of Trust, 289; Darcy and Hall, 1 Verm., 9.

See also Van Epps vs. Van Epps, 9 Paige, 237; Torrey vs. Bank of New Orleans, 9 Paige, 649; Dickinson vs. Goodwin, 1 Sanford's Ch.; Sitembe vs. Putnam, 30 Cal., 490; Hall vs. Van Ness, 49 Penn. St., 457; Campbell vs. Campbell, 21 Mich., 459; King vs. Cushman, 43 Ill.; Harrall vs. Lane, 53 Penn. St., 269; East vs. Paige, 63 Penn. Stat., 108; Holmes vs. Campbell, 10 Minn., 40.

7TH.—ACT OF 1870 RELATIVE TO EXECUTORS.

In conclusion, under this head, we will present the statute of 1870 relative to the estates of deceased persons, and which was in force when the sale to Gillette was made.

Section 172, page 165, Acts of 1870, is as follows:

"If the executor or administrator, directly or indirectly, purchase any part of the estate, upon the application of any person interested in the administration, an order shall be made that such part shall be held in trust for the estate, and the executor or administrator shall only be entitled to retain in lieu thereof the amount he shall prove to have been paid by him therefor. This includes the purchase of claims."

This statute simply declares what the law was, and always has been, and provides a speedy and efficient remedy in case of its violation.

If it be contended that the statute was intended to relate exclusively to sales made in due course of administration, we reply, that the reason which may be urged in support of the policy of the statute, as thus construed, apply, with even greater force, in support of our position in reference to the case at bar.

Where the administrator purchases at a sale made in due course of administration, and the purchase money is paid over to the estate, the estate does derive a benefit from the sale. But in the case at bar, Mrs. Allen derived no benefit from the purchase by Gillette. She did not receive the purchase money; she never, by her consent, parted with

her interest in the title. Her necessities simply compelled her to acquiesce in such sale as the trustee might make, in accordance with the terms of the mortgage.

We will close this branch of our argument with one more quotation from 1 Perry on Trusts, page 124: "If a trustee purchase a mortgage, he cannot retain the same for his own benefit, but must hold it as a resulting trust for the benefit of the *cestui que trust.*" We cannot conceive of a case where the above rule would apply with more force than in the case at bar.

## SECOND POINT.

*Statement of complainant's theory as to limitations and laches.*

When the evidence establishing a resulting trust is unimpaired, it can only be barred by the analogous statutory period of limitations; it is never barred by laches. Thus, Gillette has no more reason to complain of Mrs. Allen's alleged laches in bringing this suit than she has to complain of his own laches in failing to have the property resold for her benefit. The money paid by him for her benefit has been securely invested in the property, and has been increasing at the rate of eight per cent. per annum. He has seen proper to let it remain thus invested, and she has acquiesced in it. Also, that in any event, laches cannot be imputed against a married woman.

### REMARKS.

1ST.—AS TO LIMITATIONS.

Ten years was, of course, the shortest period which would bar complainant's right by virtue of mere limitations.

The provisions of the Texas statutes on the subject, then in force, which need not be set out in full, show that ten years was the longest statutory period. Paschal's Digest Laws of Texas, Art. 4617, *et seq.* See also Angel on Limitations, Sec. 25.

On this point Angel uses the following language in section 29: "So strictly are the above rules adhered to in

a court of equity, that persons laboring under any of the disabilities specified in the statute, will be allowed the same time, and no more, that they would be entitled to in the case of an action at law."

See also Perry on Trusts, 2, Sec. 360, as follows: "So if the *cestui que trust* is under a disability, the statute will not begin to run until the disability is removed."

The Texas statute in regard to disabilities, applicable to the case at bar, is as follows:

"If a person entitled to bring any action for the recovery of real property, or to make any defense founded on the title thereto, be at the time, such title shall first descend or the adverse possession commence,

1. Under the age of twenty-one years; or
2. A married woman, * * * the time during which such disability shall continue, shall not be deemed any portion of the time limited for the commencement of such suit or the making of such defense, and such person shall have the same trial after the removal of his disabilities that is allowed to others by the provisions of this chapter." Paschal's Digest Laws of Texas, Art. 4621, *et seq.*

2D.—AS TO LACHES

It not appearing from the bill or answer that complainant ever in any way, ratified or confirmed the sale to Gillette, the only remaining point to be considered is that of laches.

*Character of Trusts which are never barred by mere Laches.*

We affirm without hesitation, that in no instance was an express, implied or resulting trust, ever barred on the ground of laches, where there had been a delay of less than the statutory period of limitations, except when, from lapse of time, the evidence of the transaction was impaired. We challenge the defendant's council to produce a single case controverting this rule.

Constructive trusts are sometimes barred by laches in less than the statutory period of limitations. But not so as to express, implied or resulting trusts, except as above; nor have we been able to find any case, even of a constructive trust, in which the *cestui que trust* was held to

have been barred by his laches in less than the statutory period of limitations, unless the laches were coupled with an enjoyment of the benefits resulting to him from the transaction, together with his consent, express or implied, on this point. See Sec. 965, Vol. 2, Pom. on Eq.

It will be found in every case on which the defendant may rely to sustain his plea of laches, that the trust was a constructive one, unless time had impaired the evidence necessary to establish it.

To put the proposition in another way, we say that no kind of trusts, not originating in fraud, *i. e.* constructive trusts, are barred by mere laches or acquiescence on the part of the *cestui que trust*, in less than the statutory period of limitations.

## *Analysis of the Principles on which the above rule is founded, and application of the same to the allegations in the bill.*

In Sec. 166, Vol. 1, Perry on Trusts, the author says in relation to express, implied and resulting trusts: "These trusts arise, result, or are implied from the contracts and relations of the parties. * * * There *is another* large class of trusts. * * * Such trusts are called constructive trusts." There is no fraud in the creation of a resulting trust.

### The Case at Bar is a Resulting Trust.

It was perfectly proper for Gillette to bid in the property at that sale, and protect in this way the interest of his *cestui que trust*. He had a right to take the title in his own name, in order to secure the money paid out for it. The law conclusively presumes that he intended to act honorably in the matter, and that he did take the title for this purpose. On this point, speaking of resulting trusts, Section 124, Vol. 1, Perry on Trusts: "They are trusts which result in law from the acts of the parties, whether they *intended to create them or not.* * * because the law presumes them to be intended by the parties, from the nature and character of their transactions with each other."

Suppose Gillette had bargained directly with Mrs. Allen,

and paid her $1,200.00 for her interest. If there were fraud in the transaction, if he failed to make the proper explanation, a constructive trust would be created.

Or suppose an agent or trustee to sell, were to sell indirectly to himself, but that the principal, nevertheless, should accept the purchase money and retain it, with knowledge of the fact; if by means of any misrepresentation, or suppression of facts, the principal was induced to ratify the transaction, a constructive trust would be created.

Now, even admitting, (though the case of Alores vs. Jewell, 4 Otto, 506, is expressly to the contrary,) that in cases of a similar nature to those instanced above, the weight of authority is to the effect that the *cestui que trust* must elect, within a reasonable time, and within the statutory period of limitation, whether to sue for cancellation or to retain the benefit of the transaction, we confidently assert that none of the reasons on which this rule is founded are applicable to a resulting trust like the one at bar.

One of the reasons referred to above is, that the *cestui que trust* ought not to retain in his hands the results of the transaction, and at the same time speculate on the chances of its becoming more profitable for him in the future to rescind it. Some courts seem to hold that to permit the *cestui que trust* to do this, would give him an undue advantage over the trustee, since the option to rescind is not mutual. The trustee cannot go into court and set up the fact of his own fraud, and ask that the property be sold under the direction of the court, for the benefit of himself and the *cestui que trust.* In the case at bar, however, Gillette and Mrs. Allen were on the same footing, in the particular just referred to. Gillette, at his option, could go into court at any time, and ask to be relieved of the trust, and ask that a sufficient amount of the property be sold to reimburse him for all that he had expended in protecting the interest of his beneficiary; and he could also have obtained the permission of the court to bid in the property absolutely for his own use at such resale, had it become necessary to do so in order to protect his interest.

Again, Mrs. Allen has not been enjoying the fruits of this transaction in any greater degree than Gillette himself. Interest has been constantly accruing in his favor on the sum which he advanced, and he has had the privilege at

any time of realizing on his investment by means of a resale under the directions of a court of equity, as above suggested.

Another reason why a constructive trust may be barred by laches, and which is wholly inapplicable to a resulting trust, is this: Suppose that in case of a constructive trust, like one of those instanced above, the trustee does really acquire the property fairly and in perfect good faith; in such case he ought not to be subjected to a suit ordinarily for its recovery by the *cestui que trust*, after a reasonable time has elapsed, the point being that a trustee has a right to purchase the property absolutely, if he does so fairly and in perfect good faith, after having made all proper explanations, he paying for the property all that it is worth. In such a case the trustee should be permitted to arrange his affairs relative to the purchase on a permanent basis as speedily as possible. Public policy demands that after a reasonable time, the trustee, in such a case, be relieved from the apprehension of litigation, particularly, since in case of litigation, the burden of proof is on him to show that his title was fairly acquired. If this were not so, a a trustee, under no circumstances, would dare to purchase from his *cestui que trust*, and the right of the latter to dispose of his property to the best advantage might thus be denied him. Now, in the case at bar, Gillette, as we have seen, got no title at all. He had in effect simply purchased a mortgage. He had no right to make any business arrangement on the assumption that he had a title, and that after a reasonable time he would not be disturbed in the enjoyment of it.

Suppose Gillette, before he purchased at that sale, had expressly agreed with Mrs. Allen that he would only take the title in his own name, as security for what he had to pay for it; this would have made him, in effect, a mortgagee by agreement. In such case, would any lawyer for a moment dream of asserting that any period less than ten years would bar Mrs. Allen's right to redeem the property, or to go into court and ask that enough of it be sold to satisfy Gillette's claim, and that the rest be decreed to her? Would they assert, in view of the enhanced value of the property, that it was contrary to good conscience for her to demand this after the lapse of six or seven months from her discoverture, while Gillette, during all this time, was getting eight per cent. interest on his investment, and

could have realized on it years before had he thought proper to go into a court of equity for that purpose? It is absurd to talk of such a thing. Yet, as we have seen, there is no difference whatever, in equity, between Gillette's present position, and what it would have been had he bid in the property in accordance with an express agreement to hold it as a mortgagee.

They, resulting trusts, are "trusts which result in law from the acts of the parties, whether they intend to create them or not, * * * because the law presumes them to be intended by the parties from the nature and character of their transactions with each other." 1 Perry on Trusts, 124.

## PART II.

### On the Question of Estoppel by either Consent or Ratification.

#### Further Statement.

The answer of defendant does not show that complainant ever, herself, consented to his purchase at the foreclosure sale. It states that defendant first learned of the sale a few days before it took place, and that he "came to Galveston at once, and not more than two days preceding the day of sale. The complainant, as he now remembers and believes, *was sick and confined to her bed.*" Rec., p. 30.

The following comprises all that is alleged on this point:

"Defendant, prior to said sale, saw said Allen, the husband of complainant, and on hearing from him again that they could do nothing except to permit the sale to proceed for whatever the lands would bring, defendant informed said Allen of what had transpired with said Ball, and of the said conclusion on the part of defendant, at which said Allen expressed his satisfaction at the prospect that defendant might become the purchaser, instead of said Banking Company, as said Allen had supposed would be the case."

"No objection whatever was suggested by said Allen to purchase by this defendant. No complaint was in any manner made by him of any action or omission by defendant connected with the administration of said estate, or the sale of the interest of said complainant. No request or

suggestion was made by him as to anything that defendant was, or had ever been, expected to do, or could do, to prevent said sale, or be of aid or service to them. * * The said Henry S. Allen was present at said sale, and heard and was fully aware of the bid by this defendant, and defendant's purchase of said property, and knew that the same was a purchase by defendant in his own personal right and for his own benefit, and without any trust for or liability to complainant, and made no dissent thereto in any manner, but expressed satisfaction that defendant became such purchaser." Rec., p. 31.

There are no averments in the answer of any ratification of the purchase on the part of complainant, other than her passive acquiesence.

It was averred in the answer that defendant after having ascertained that the property would inevitably be sold, etc., "made up his mind to attend said sale, and bid the amount of the debt and expenses of the sale." (Rec., p. 31.) He then informs plaintiff's husband of his intention, and the latter expresses his approval. *Id.*

## FIRST POINT.

There was no element of estoppel in the transaction, because it is not shown that defendant acted on, or was induced to act upon, any consent given by the husband, much less by complainant herself. He makes up his mind to purchase, then informs complainant's husband of his intention, and the latter acquieses. Objection on his part or her part would then have been futile; the sale would nevertheless have taken place. Again, consent on the husband's part could not divest the wife of her interest in the land, and thereby enable her trustee to acquire a title absolute, instead of one on a resulting trust. See statutes quoted below.

### Statutes of Texas Bearing on This Branch of the Case.

"The husband and wife shall join in the conveyance of real estate the separate property of the wife, and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband, before some officer authorized by law to take acknowledgements of to deeds." Paschal's Digest, Art. 1003.

That married women under laws of Texas, can only convey their separate property by means of a deed properly acknowledged. Cole vs. Bammel, 62 Tex., 108; Johnson vs. Bryan, 62 Tex., 623; Ruleman vs. Pritchell, 56 Tex., 482; Davis vs. McCartney, 64 Tex., 584.

The laws of Texas further provide that "all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, device or descent, as also the increase of all bonds thus acquired, shall be the separate property of the wife." Paschal's Digest, Art., 4641.

REMARKS.

*First:* Before touching directly upon the point in issue in this argument, we trust the court will indulge us in a brief resume of the principles of equity already referred to, which, to our minds, firmly establish the premises on which this supplemental argument will be based. While these elementary principles are well remembered by the court, it may nevertheless be profitable to restate them in this brief in order that the relation which they bear to the facts of this case may be clearly seen. Begging the court's pardon therefor, we cannot resist the inclination of inserting the following quotation on this point: "In the first place, when the trustee deals with the trust property, *but not directly with the cestui que trust*, and without the latter's intervention, the rule is inflexibly established, that where in the management and performance of the trust, trust property of any description * * * is sold, the trustee cannot, without the *knowledge and consent* of the *cestui que trust*, directly or indirectly become the purchaser. Such a purchase is always voidable, and will be set aside on behalf of the beneficiary, unless he has affirmed it, being *sui juris*, after obtaining full knowledge of all the facts." 2 Pom. Eq., Sec. 958.

(*a*) We assert that no well considered case can be found within the lids of a law book militating against the above rule. Counsel for defendant gravely referred to the case of Blackman vs. Shelly, 8 Humph., 439, where a guardian purchased the property of his ward at sale under decree of court, as being conclusive of this one. That case, however, bears no analogy to the one at bar, and is not

an exception to the inflexible "rule" stated by Pomeroy, because the purchaser at the sale of a ward acquires no title until it is confirmed by the court. So too as to the apparent exceptions in cases from one or two states in which purchases by executors have been upheld, special statutes have generally authorized them. Again, executor's sales are made ordinarily under the direction of a court, and are not usually valid except upon the express approval of the court. But in the case at bar, the trust was administered independently of "any court or judge." Gillette was not only an executor in the usual sense, but he was a *trustee*, with as much authority over the estate entrusted to him as was ever vested in a trustee.

(*b*) The point that the sale did not result directly from any act of Gillette; that he was not instrumental in procuring it, and hence that the rule does not apply, is, to our mind, puerile in the extreme. Courts of equity do not split hairs in considering trust relationships. Every reason in support of the policy of removing from the trustee the temptation to perpetrate a fraud by hidden methods, which can be advanced in one case, can be urged with equal force in the other. But as to this the authorities are conclusive. In Quackenbush vs. Leonard, *et al.*, 9 Paige, 334, stated on pp. *ante*, the *cestui que trust* mortgaged his interest in the land *after* the trust had been created, precisely as in the case at bar. The mortgagee sold the mortgage to the trustee at a discount, with the *knowledge* and with much more *consent* on the part of the *cestui que trust* than as is alleged in defendant's answer. The confidential relationship in that case was not nearly as strong as in the case at bar, and yet the court held that the trustee took the mortgage upon a resulting trust.

*Second:* Believing this court, after an investigation of this case, will entertain no doubt as to the fact that Gillette's relationship, at the time of the sale, was such as absolutely to prohibit him from buying that property except on a resulting trust, we will now proceed to discuss the question as to whether the answer charges such facts as to knowledge and consent on the part of Mrs. Allen, as to change the character of the trust.

(1.) If, in a case like that at bar, equity permitted the trustee to purchase the property otherwise than upon a resulting trust, by simply obtaining the consent of the *cestui que trust*, the purpose of the rule, which is "*to remove*

*every temptation from the trustee*, (2 Pom. Eq., 482,) would be defeated.

Equity says to the trustee "it is useless for you to delay the settlement of the estate in the hope that some act of imprudence on the part of the legatee, induced perhaps by her necessities, will enable you to acquire her interest in it in an indirect manner, *i. e.*, through a forced sale, without being compelled to make the necessary explanations and submitting to her being independently advised, as would be necessary were you to buy directly from her. Nor will you be permitted to accomplish your purpose by simply getting her consent when the sale does take place."

The truth may be that during the six years which elapsed from the creation of the trust to the sale, Gillette's opportunities of selling off enough of the lands at fair prices to have paid the debts were ample; the truth may be that long anterior to the sale he could have effected, with the aid of the courts or with the consent of the creditors, a partial partition of the estate, dividing half the lands among the legatees, and reserving the balance for the settlement of the debts, and yet "*from the infirmity of human testimony*," it is utterly impossible to prove this fact. A man from the North, seeking a permanent investment writes Gillette, offering him a fair price for a 20,000 acre tract of land. Gillette never replies to the letter. What chances are there of proving this circumstance?

With every appearance of honesty and good faith, the trustee may ingratiate himself into the confidence of the *cestui que trust*, while he is deliberately carrying out a deeply laid scheme to defraud her Will equity permit him to hope to consumate his plans successfully, provided, at the last moment, he can get his unsuspecting victim simply to consent to his purchase?

(2.) Such consent is not the kind contemplated in the text quoted from Pomeroy, *supra*. By his "hidden hand," in a manner inaccessible to the eye of the court, (2 Pom. Eq., 485, note,) he has brought about the condition in which it is futile for the *cestui que trust* to refuse her consent. She has no choice in the matter. She cannot stop the sale by her refusal.

(3.) It may be suggested that the trustee has the same temptation to create an opportunity of defrauding the *cestui que trust*, from the fact that the law does permit him to

purchase the title directly from the *cestui que trust*. But how does the law permit this to be done? Only by his informing her, at the time of the sale, of every material fact and circumstance connected with the trust. She must be independently advised by a competent person. Such advisor might ask of him some embarrassing question. It might be difficult to show such advisor why a third at least of the estate should not be immediately divided among the legatees. These obstacles strongly tend to remove the temptation.

(4.) If Gillette took a beneficiary title at that sale, then it follows that he acquired the property without ever having made that thorough and complete explanation of the condition and value of the lands which is necessary in all cases where trustee purchases directly from the *cestui que trust*. The fact as averred in defendant's answer, that he had explained to complainant and her husband, on various occasions, "all matters he supposed at the time of interest to them," (paragraph seventh), etc., etc., is not such an explanation as the law required. The *cestui que trust* was not then interested so deeply in the matter—the explanations must be made at the time of the sale. So also the *cestui que trust*, in a case like that at bar, must be independently advised, and it is not averred that she acted on the advice of any one.

(5.) That anything which complainant's husband could do or say would not be binding on her, it seems to us is too plain for argument.

The answer avers that defendant "came to Galveston at once, and not more than two days preceding the day of sale. The complainant, as he now remembers and believes, was sick and confined to her bed." Is it possible that anything which a sick woman confined to her bed might say would give validity to the purchase?

Again, it is not averred that Gillette was induced to make the purchase by reason of any act or word on her part, or that he relied on the same in any way, consequently she is not estopped by any such act or word.

It is not even averred that Gillette was induced to make the purchase by reason of any act or word on the part of complainant's *husband*. Gillete says that "prior to said sale" he saw Allen, and informed him "of what had transpired with said Ball, and of said conclusion on the part of defendant." It thus appears that he made up his

mind to buy the property before he saw complainant's husband, and when he did see him he simply told him what he had decided to do, and the former expressed *his* satisfaction. [In the case of Quackenbush vs. Leonard *et al.*, 9 Paige, 334, *supra*, the *cestui que trust* told the party to convey to his trustee if he must.] Gillette does not state that the failure of Allen to object to the purchase in any way induced him to carry out the resolution which he had previously formed, or that he would not have made the purchase had Allen demurred to his doing so.

The theory upon which it is sought to show the validity of Gillette's title, by reason of Mrs. Allen's assumed consent, is based on the principle of her being estopped, by her own act, from claiming that he took the property upon a resulting trust. On this point, see 2 Pom. Eq., Sec. 812, where the following language is used: "The cases all agree that there can be no estoppel unless the party who alleges it relied upon the representation, was induced to act by it, and thus relying and induced, did take some action."

Again, there can be no estoppel unless the party against whom it is urged was, at the time, fully informed of her right, and of the facts relative to the matter. 2 Pom. Eq., 809. Also, see case of Turner vs. Furgerson, 58 Tex.

Before closing, we desire to add one suggestion further, in reference to the points discussed on page . . of this brief. The fact that under the laws of Texas, in force at the time of this sale, an executor, under no circumstances, could purchase for himself, even though the sale, as in the case of all sales under decree of the Probate Court, was subject to the scrutiny of the court, and dependent upon its approval, shows the policy of Texas on the subject to have been even more rigorous than that of many other States. If an executor, administering an estate under the direction of a court, required to make annual reports, and in no case permitted to sell lands except upon consent of the court, obtained after showing the necessity for the sale, and the validity of the sale being wholly dependent upon the subsequent approval of the court—if, with so many safeguards as these, a purchase by the executor, except upon a resulting trust, was made impossible by an express statutory declaration of the policy of the state, what possible ground can there be for contending that the policy of our state presents an exception to the rule "*inflexibly*

*established*," announced in Pomeroy's Equity, *supra?* Why should a law be passed prohibiting an executor from purchasing when he acts under the eye of the court—when he must first show the court a necessity for the sale, the validity of which is dependent upon the confirmation by the court? The policy of the law is founded on the reasons stated on pages 6, 7 and 8 *ante*, and these reasons apply with far greater force in the case at bar.

In the former case the executor is required to file annual reports under oath, open to the inspection of the world, showing the condition of the estate and its indebtedness, subject to the approval of the court. In the case at bar he only filed an inventory, six years before, when he assumed the trust.

J. T. BRADY,

H. F. RING,

*Counsel for Appellant, Fannie B. Allen.*